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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

NUMBER [redacted] ORIGINAL 86

IN EQUITY

THE STATE OF LOUISIANA,

Complainant,

Versus

THE STATE OF MISSISSIPPI,

Defendant.

BRIEF FOR THE STATE OF MISSISSIPPI DEFENDANT

RUSH H. KNOX,
Attorney General of Mississippi,
PAT HENRY,
RUFUS CREEKMORE,
ELMER C. SHARP,
HIRAM H. CREEKMORE,
Solicitors for the State of Mississippi.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1928

NUMBER 9, ORIGINAL

IN EQUITY

THE STATE OF LOUISIANA,
Complainant,

Versus

THE STATE OF MISSISSIPPI,
Defendant.

BRIEF FOR THE STATE OF MISSISSIPPI, DEFENDANT

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IN THE
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No. 9 Original

IN EQUITY

THE STATE OF LOUISIANA,
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vs.

THE STATE OF MISSISSIPPI,
Defendant.

BRIEF FOR THE STATE OF MISSISSIPPI, DEFENDANT

SYLLABUS

BURDEN OF PROOF

1. The same rules of law are applicable in boundary disputes between states as between individuals.

Rhode Island vs. Massachusetts, 12 Peters, 734, 9 Law Ed., 1233.

2. The fact that the boundary between the states is found in running water, does not vary this rule; the same rules of law with reference to erosion, accretion and avulsion as applied to suits between private individuals being recognized in boundary suits between states.

City of New Orleans vs. United States, 10 Peters 662, 9 L. Ed., 573.
Nebraska vs. Iowa, 143 U. S. 593, 36 L. Ed., 186,;
Missouri vs. Nebraska, 196 U. S. 23, 49 L. Ed., 372;
Arkansas vs. Tennessee, 246 U. S. 158, 62 L. Ed., 638.

3. There is a presumption in favor of the permanency of boundary lines once established.

Tennessee vs. Muncie Pulp Company, 119 Tenn. 47, 104 S. W., 437;
Simpson vs. Martin, 174 Ark. 956, 298 S. W., 861.

4. A party asserting material changes in the course of a boundary river such as affects the boundary line, has the burden of proving such changes.

Oklahoma vs. Texas, 260 U. S. 606, 67 L. Ed., 428;
Simpson vs. Martin, 174 Ark. 956, 298 S. W., 861;
Baumhart vs. McClure, 21 Ohio, Appellate, 491, 153 N. E., 211.

5. Before riparian rights can attach to land, the land itself must be contiguous to the water, actual contact therewith being necessary.

Farnham on Water and Water Rights, Vol. 1, p. 304;
Kinney on Irrigation and Water Rights, Vol. 1., pp. 760 and 761;
Saulet vs. Shepherd, 4 Wallace 502, 18 L. ed., 446;
Posey vs. James, 75 Tenn. (7 Lea), 98;
Fulton vs Frandoley, 63 Tex., 330;
Nugent vs. Mallory, 145 Ky., 824, 141 S. W., 850;
Wilson vs. Watson, 144 Ky., 352, 138 S. W., 283;
Ann. Cas., 1913-A, 774.

6. The party claiming land as accretion therefore, has the burden of proving (a) that such lands were actually formed by accretion, (b) that they attached to lands belonging to him and contiguous to the water.

Green vs. Witten, 200 Ky. 725, 255 S. W., 519;
Tillotson vs. Fulp, 172 N. C., 499, 90 S. E., 500;
Mann vs. Archbell, 186 N. C., 72, 118 S. E., 911;
Ball vs. McDuffy (Tex. Civ. App. May, 1919). 212 S. W., 844;

Producers Oil Company vs State (Tex. Civ. App., May, 1919), 213 S. W., 349;
Land vs. Dunn (Tex. Civ. App. Nov., 1920), 226 S. W., 801;
Lennox vs. Isbell (Tex. Civ. App., Dec., 1922), 245 S. W., 728;
Petty vs. Oil Company (Tex. Civ. App., Oct., 1923), 254 S. W., 565.

THE BOUNDARY LINE

7. The middle of the main channel of navigation is the boundary line between two states when such boundary is found in navigable waters.

Minnesota vs. Wisconsin, 252 U. S., 273, 64 L. Ed., 558;
Iowa vs. Illinois, 147 U. S., 1., 37 L. Ed., 57;
Arkansas vs. Tennessee, 246 U. S. 158, 62 L. Ed., 638.

8. Where a navigable river is the boundary line between states and the channel of navigation is changed by the gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; but where such channel is changed violently and suddenly by the process known as avulsion, then the resulting change in the channel does not change the boundary.

Nebraska vs. Iowa, 143 U. S. 539, 36 L. Ed., 186;
Missouri vs. Nebraska, 196 U. S. 23, 49 L. Ed., 372;
Arkansas vs. Tennessee, 246 U. S. 158, 62 L. Ed., 638;
Oklahoma vs. Texas, 260 U. S. 606, 67 L. Ed., 428;

9. Where in a boundary river, the channel of navigation changes from one side of an island to the other, such change in the channel is treated as an avulsion and the boundary line between the states is not affected thereby.

Missouri vs. Kentucky, 11 Wallace, 395, 20 L. Ed., 116;
Indiana vs. Kentucky, 136 U. S. 1, 34 L. Ed., 329.

10. Nor, in such case does the fact that the old channel of navigation becomes dry land and filled up so as to connect the island to the opposite shore, vary the rule in this

regard; the boundary line being fixed as it was prior to such avulsion or change in the channel of the river.

Indiana vs. Kentucky, 136 U. S. 1, 34 L. Ed., 638.

11. The filling up of the old channel of a river in such a case is to be treated as an ultimate effect of the avulsion and not as an accretion.

Arkansas vs. Tennessee, 246 U. S. 158, 62 L. Ed., 638.

WEIGHT OF THE EVIDENCE

12. Long acquiescence in the location of a particular boundary and the exercise of dominion and sovereignty over the territory within it is conclusive as between the states.

Rhode Island vs. Massachusetts, 4 Howard 591, 11 L. Ed., 1116;

Missouri vs. Kentucky, 11 Wallace, 395, 20 L. Ed., 1116;

Indiana vs. Kentucky, 136 U. S. 479, 34 L. Ed. 329, 10 Sup. Ct. Rep., 1051;

Virginia vs. Tennessee, 148 U. S. 503, 37 L. Ed. 537, 13. Sup. Ct. Rep., 728;

Maryland vs. West Virginia, 217 U. S. 1, 54 L. Ed., 645;

Arkansas vs. Tennessee, 246 U. S. 158, 62 L. Ed., 638;
Michigan vs. Wisconsin, 270 U. S. 295, 70 L. Ed., 595;
Oklahoma vs. Texas, 260 U. S. 606, 67 L. Ed., 428;
Oklahoma vs. Texas, 272 U. S. 19, 71 L. Ed., 145;
Franzeni vs. Layland, 120 Wis. 72, 97 N. W., 499.

13. If the exercise of such acts of dominion and sovereignty over the territory in question by one state and acquiescence therein by the other be not sufficient to conclusively determine their rights with reference to it, these facts should nevertheless be given great weight in determining the merits of the controversy.

Indiana vs. Kentucky, 136 U. S. 479, 34 L. Ed., 329;
Louisiana vs. Mississippi, 202 U. S., 1. 50 L. Ed., 914;
Franzeni vs. Layland, 120 Wis. 72, 97 N. W., 499.

STATEMENT OF THE CASE

This is a suit in equity filed by the State of Louisiana to establish a portion of the true boundary line between it and the State of Mississippi. After answer filed by the defendant and on motion of the complainant, a commissioner was appointed by this court for the purpose of taking testimony and proof relative to the merits of the controversy. The case now comes before the court on the record and the transcript of the evidence taken before the commissioner.

STATEMENT OF FACTS

That portion of the boundary line between the states of Louisiana and Mississippi, here in dispute and the true location of which is to be determined, is in the vicinity of the territory known as Albermarle Bend of the Mississippi River, and between Issaquena County, Mississippi and East Carroll Parish, Louisiana. The territory in dispute was originally surveyed as a part of Mississippi and is described as a part of Sections 9, 10, 15, 16 and 17, all of Sections 20 and 21 and a part of Sections 22, 28, 29 and 30, all in T. 9 N. R. 8 W. Choctaw district as shown by the United States Governmental Survey of 1823. When this survey was made fractional Section 20, lots 2, 3, 4, and 5 of Sections 21; lots 3 and 4 of Section 28, all of Section 29 and fractional Section 30 composed what was known as Tullos Island, later as Island Number 98.

The remainder of the territory in dispute then lay to the East and North of Tullos Island on the Mississippi mainland, it being separated from the island by a chute running between it and the shore of the mainland.

The Louisiana shore line was surveyed in 1824. This survey shows Willow Point Plantation in Louisiana comprising fractional Sections 1 to 9, T. 19 N. R. 14 E numbered clock-wise in fan shape with the river flowing slightly south of east until it reaches Willow Point, from whence it sharply turns in a southwesterly direction.

...rict North of Red River State of Louisiana

Table of Contents

No	Area	No	Area	No	Area	No	Area
1	171 37	8	168 31	31	158 13		
2	178 60	17	160 09	32	156 98		
3	177 60	18	157 86	33	162 60		
4	170 25	19	182 66	34	161 40		
5	175 50	20	173 15	35	165 00		
6	174 72	21	159 13	36	166 42		
7	173 60	22	171 27	37	161 85		
8	167 03	23	175 40	38	164 03		
9	166 87	24	168 61	39	160 65		
10	156 60	25	165 20	40	168 42		
11	167 32	26	151 88	41	166 75		
12	162 45	27	145 13	42	164 75		
13	170 19	28	163 85	43	160 75		
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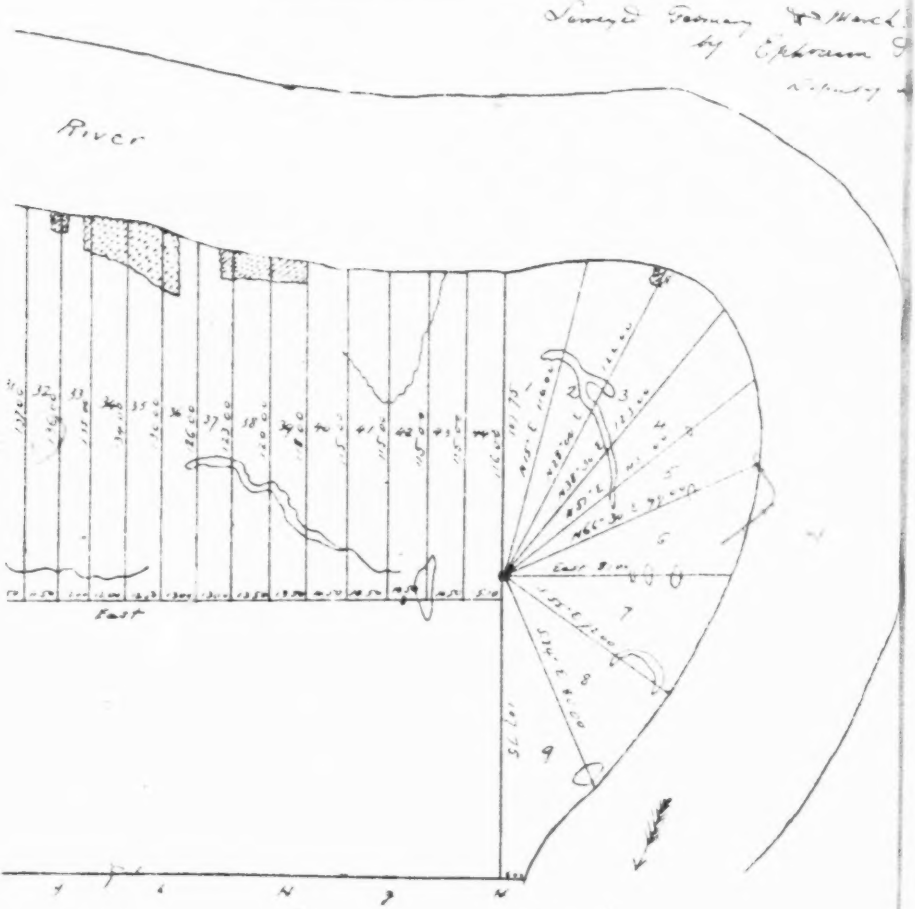
15	174 04	30	159 85				6265 93

T 19 R

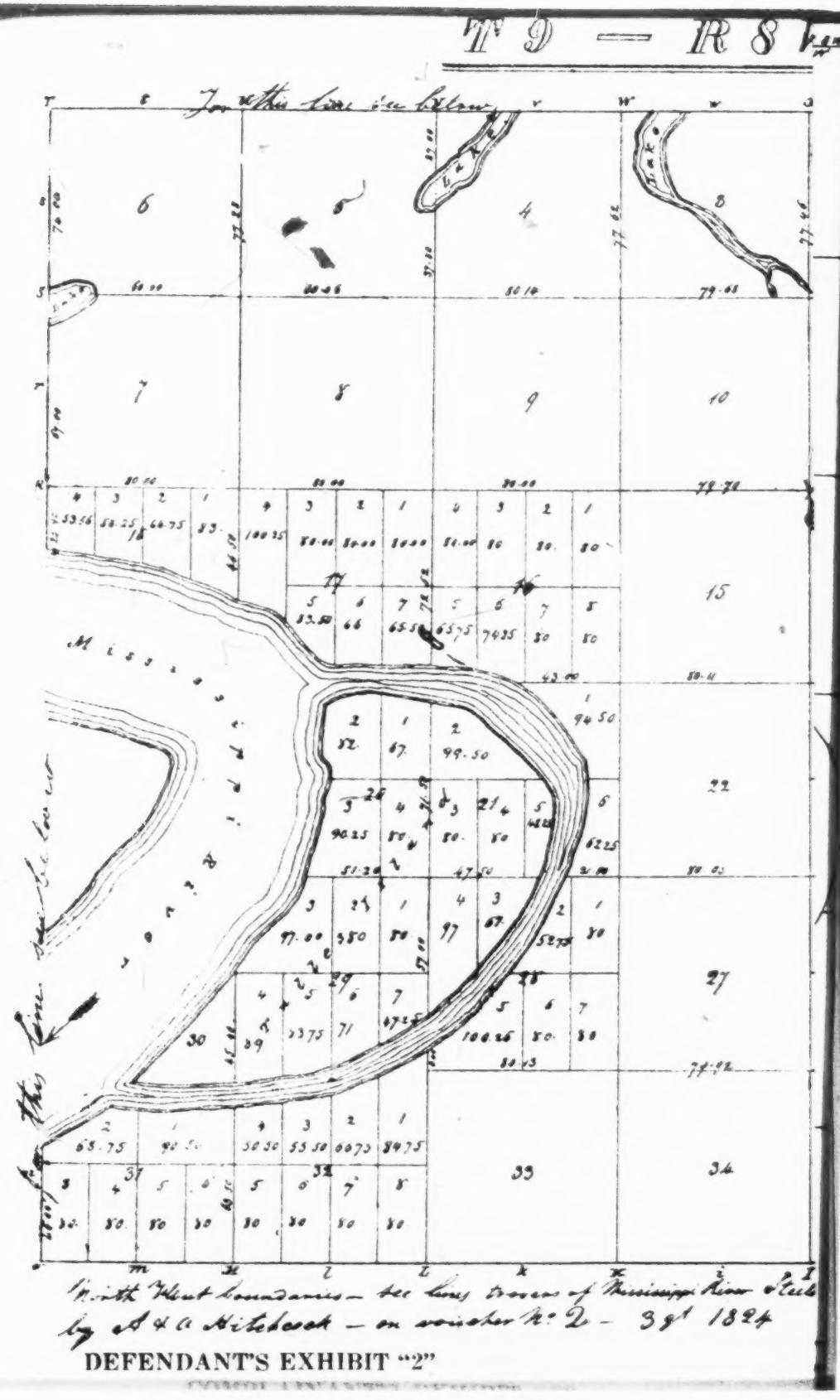
No	Area
1	15[illegible]
2	15[illegible]
3	146
4	15[illegible]
5	15[illegible]
6	15[illegible]
7	18[illegible]
8	14[illegible]
9	18[illegible]

Surveyed January [illegible] Ward [illegible]
by Ephraim [illegible]
[illegible]



[illegible] Davis
Surveyor of Public Lands

COMPLAINANTS EXHIBIT "A"



With West boundaries — See Survey of Mississippi River Trib by A & A Mitchell — on number No. 2 — 3d 1824

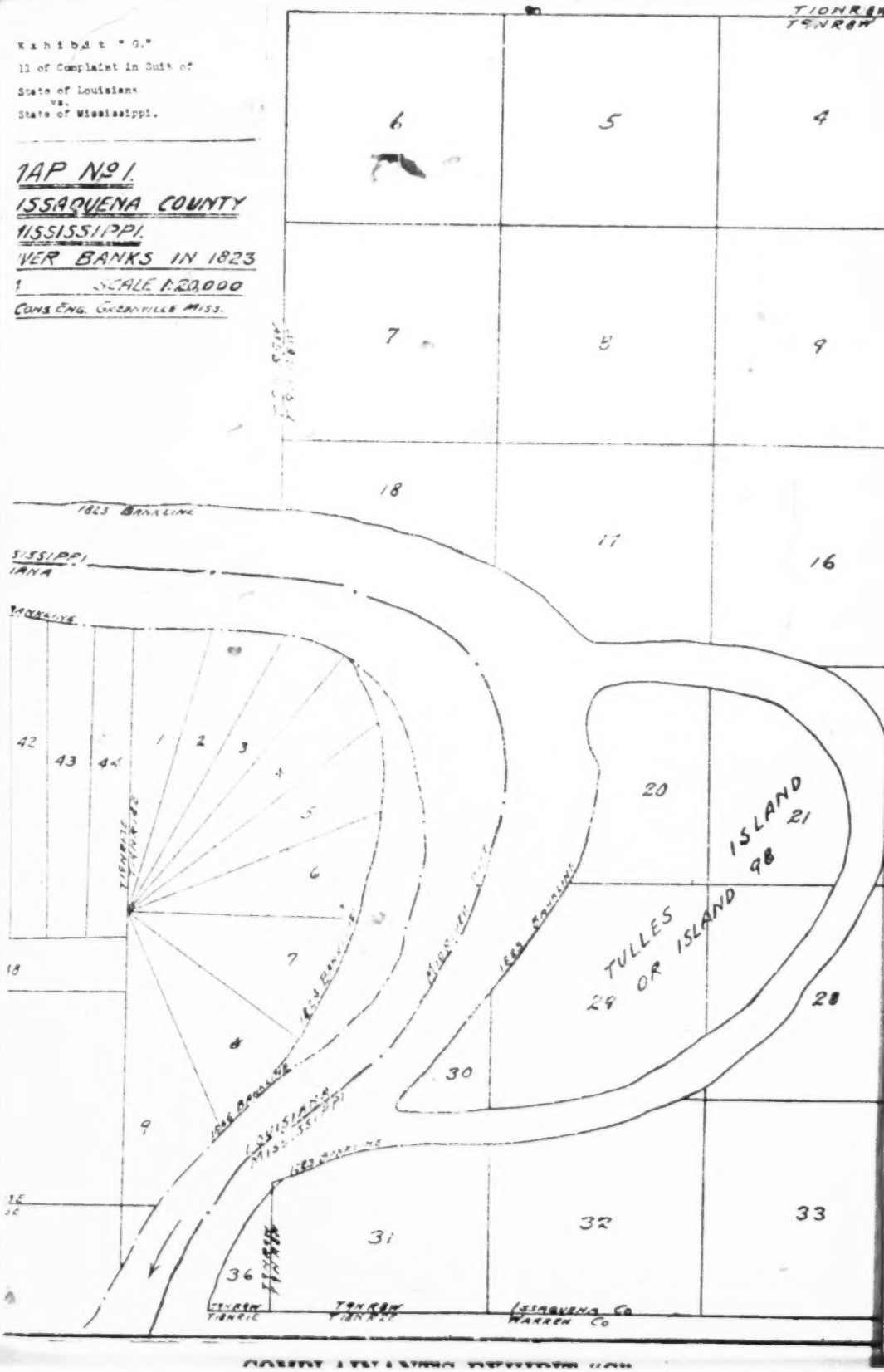
DEFENDANT'S EXHIBIT "2"

Exhibit "O"
11 of Complaint in Suit of
State of Louisiana
vs.
State of Mississippi.

MAP No. 1
ISSAQUENA COUNTY
MISSISSIPPI.
OVER BANKS IN 1823

1 SCALE 1:20,000

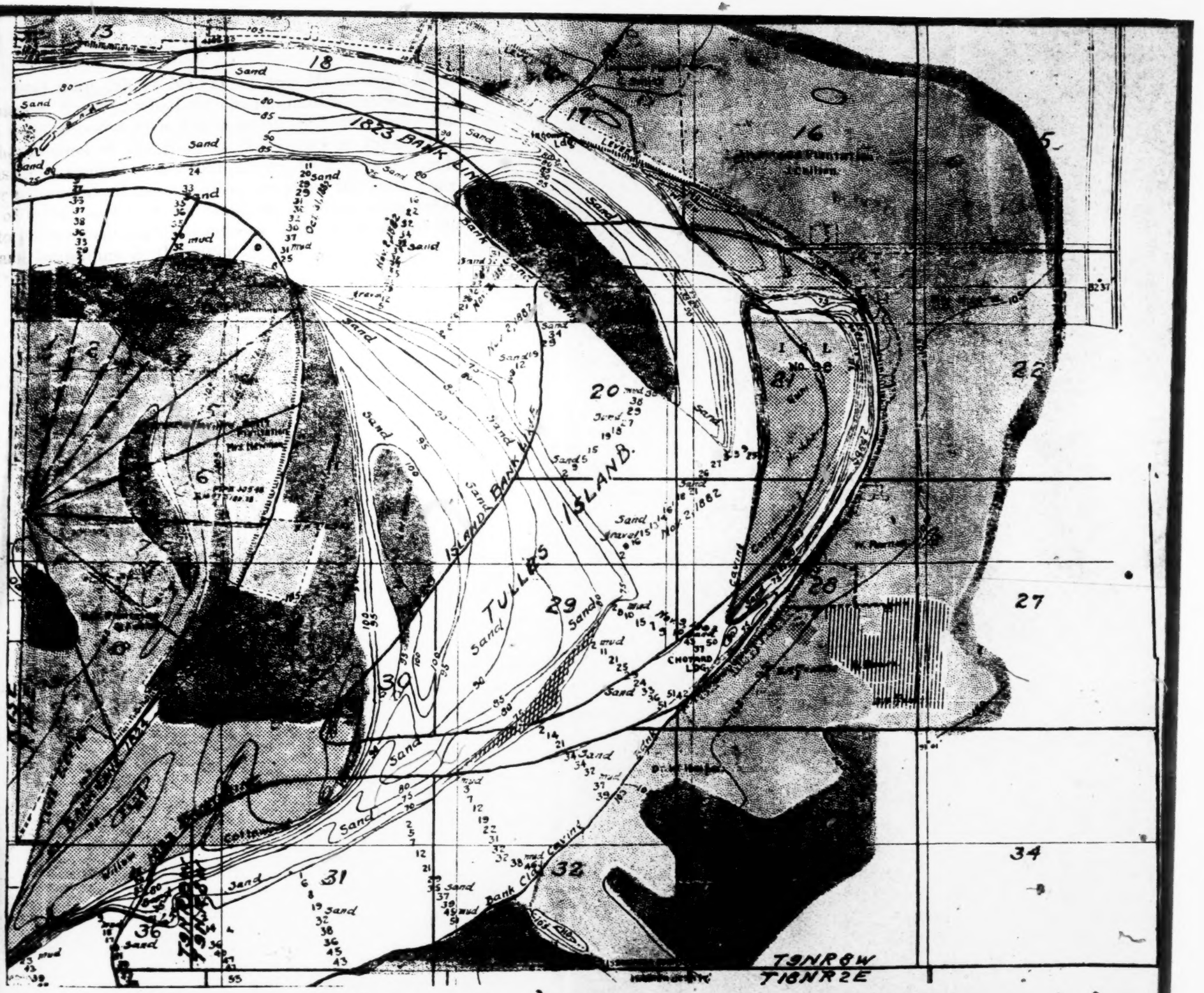
CONS ENG. GREENVILLE MISS.



The Mississippi 1823 and the Louisiana 1824 governmental surveys have been correlated by the complainant's witness, C. H. West, as is shown by the blue print exhibit "G" to his testimony.

After the 1823 and 1824 governmental surveys were made no survey of the reach of the river in question showing both banks was made until 1882, at which time Mississippi River Commission Chart No. 45 was made under the direction of the Mississippi River Commission. This chart is drawn on a scale 1:20000 and is for technical use. It shows all the details of the survey; not only the shore lines of the river and general features of the land such as levees, landings, cultivated and timbered lands but also government sights, the contours and elevations of the land and the soundings in the river. On this chart, the complainant's witness, C. H. West, has superimposed the 1823 and 1824 governmental surveys.

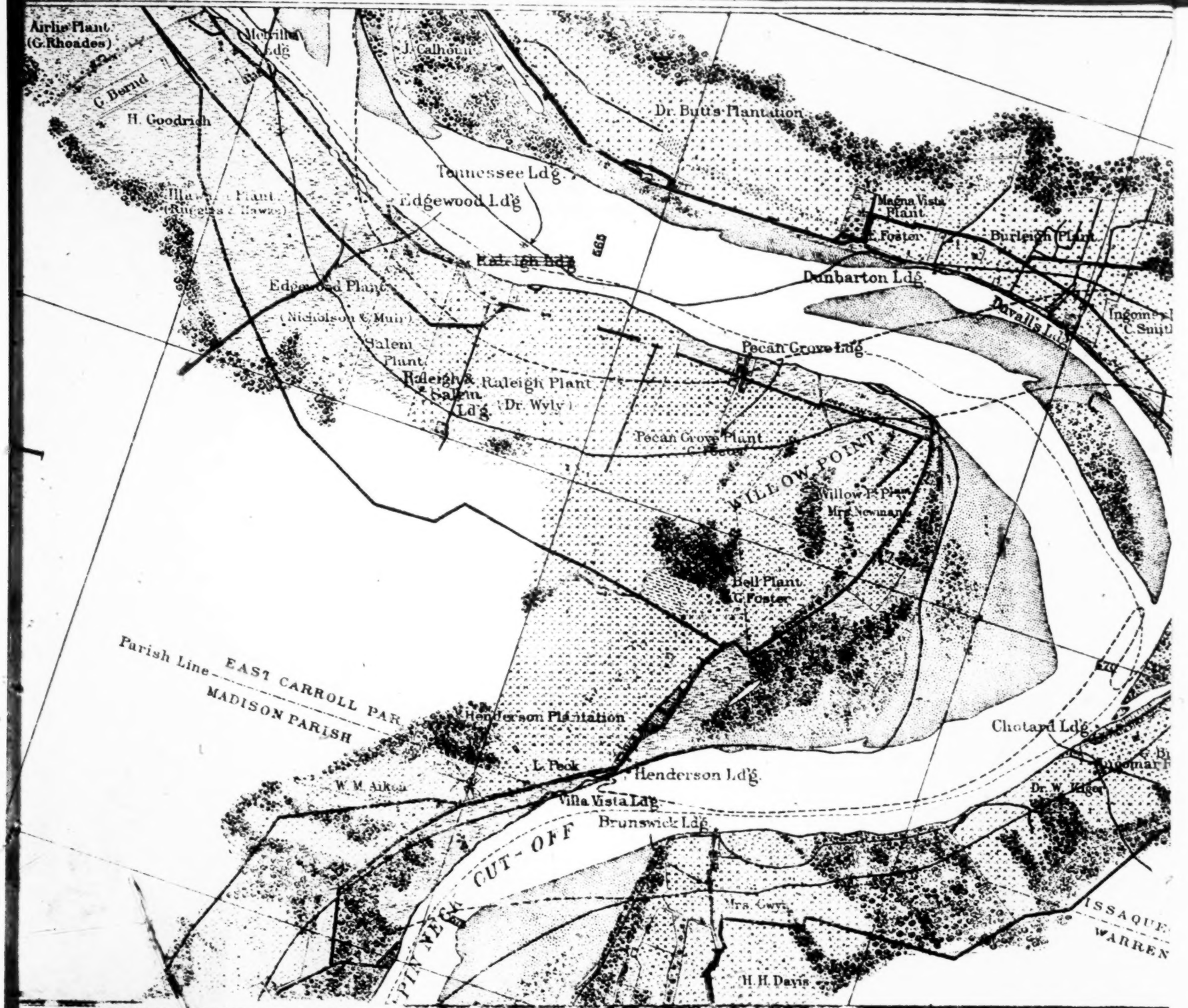
It shows the Louisiana shore to have caved along the north side of Sections 1, 2, 3, and 4, the river there since the 1824 land survey having moved south about one quarter of a mile. From the line dividing Sections 4 and 5 where little or no change has occurred, down to Section 9 the river had changed its channel to the eastward, the new channel being at its most easterly point in front of Section 7 and there approximately a mile and a half east of the channel as shown by the 1823 survey. The course of the river after reaching Willow Point has also changed, it then flowing in a southeasterly direction, whereas it had formerly flowed in a southwesterly direction. Tullos Island, or Island 98, is shown divided into two parts, this apparently having been done by the chute shown running between the upper and lower island, all of which save the lower end had closed up. The upper island composed of a part of Section 20 of original Tullos Island had extended in a northerly and westerly direction; the lower island, although greatly reduced in size, had extended slightly to the east, the growth in that direction apparently being at the expense of the old chute which is shown much narrower than by the 1823 survey.



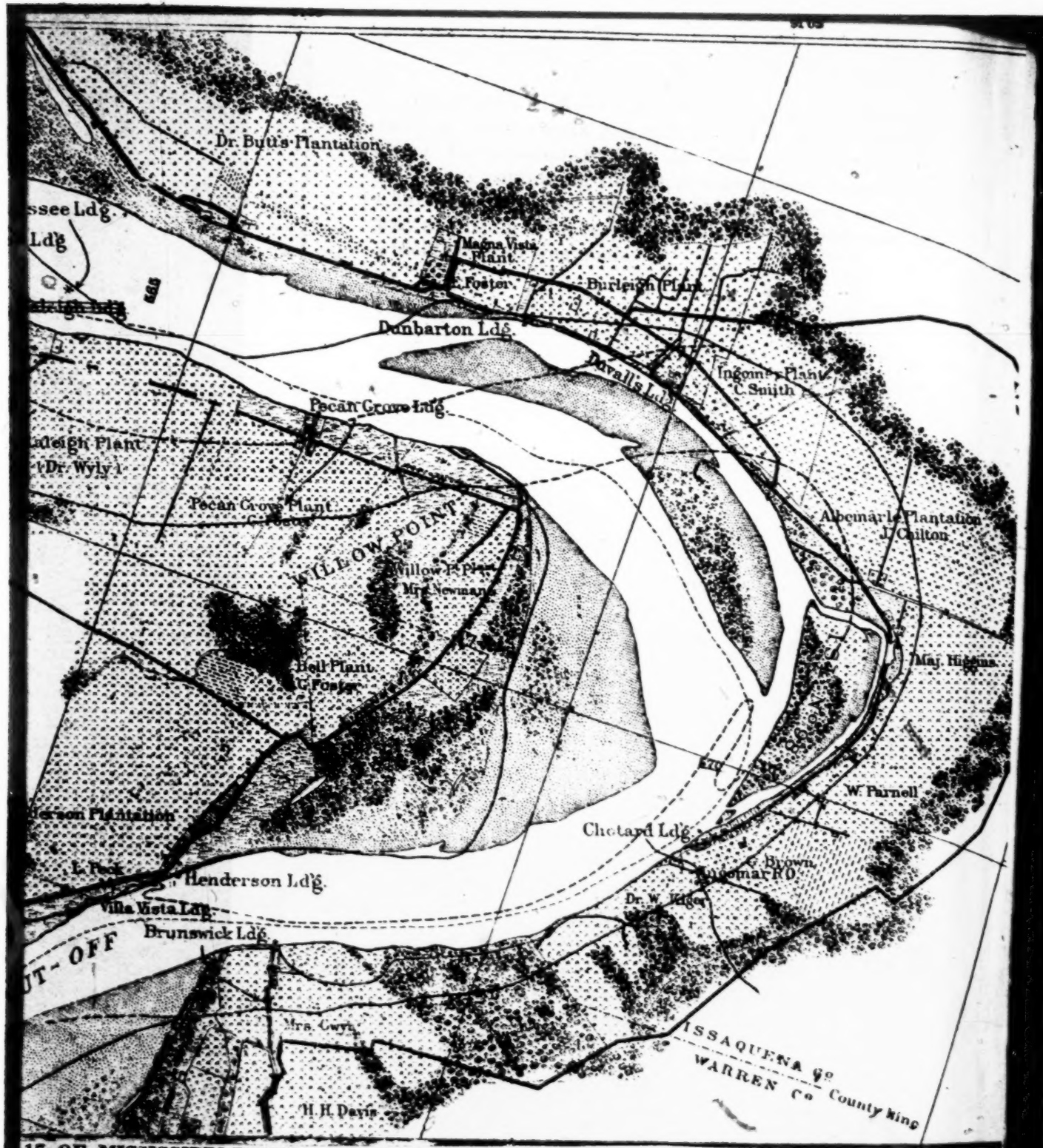
COMPLAINANT'S EXHIBIT "M", CHART 45, MISSISSIPPI RIVER COMMISSION SURVEY OF 1882.

"e next map, Sheet No. 17 of the Mississippi River ... ission Survey, which is complainant's exhibit "C" "s superimposed upon the map of 1882, the shore line the channel of the river as it existed in 1894. This "on a smaller scale than Chart 45 and is for gen- ·ı non-technical use. It does not show the same char- oı detail as Chart 45, omitting all data with refer- o government sights, contours, and elevations of the ...d soundings in the river.

Defendant's Exhibit 4-A-B-C, blue prints of the original field or work sheets No. 5, 5½, and 6 of the Mississippi River Commission Survey of 1894 does show these details, they containing the same character of data shown on Chart 45, Survey of 1882, and being prepared in the same way and being in all respects similar to the field sheets from which chart 45 was made.



COMPLAINANT'S EXHIBIT "C" SHEET 17 OF MISSISSIPPI RIVER COMMISSION SURVEY OF 1882. EDITION OF



17 OF MISSISSIPPI RIVER COMMISSION SURVEY OF 1882. EDITION OF 1900.

ıd Exhibit 4-A-B-C s·ow that the Louisiana
ıorth side had caved to a very great extent,
ılly up-stream to the west from Willow Point and
g almost to nothing at the point. The direction
low from the point had changed from the southeasterly
rec·n of 1882 to a northeasterly direction, the river
ıandoning its old bed, cutting around the head of and
o the north and east of upper and lower Tullos Island,
traddling and enlarging the original chute between Tullos
sland and the Mississippi shore and making it the new
hannel of the river. In making this new channel the
iver is shown to have cut into the main Mississippi shore
orth and northeast of Tullos Island the full width of the
iver or more, while towards the lower end of the island
there had been less caving of the Mississippi shore; the
widening of the chute there b·ing mainly at the expense
of the island, the southern and eastern part of which is
shown to be in the channel of the river. The old 1882
hannel is shown filled almost level across, twenty feet
bove the level of the then (1894) channel and twenty to
enty-five feet lower than the island.

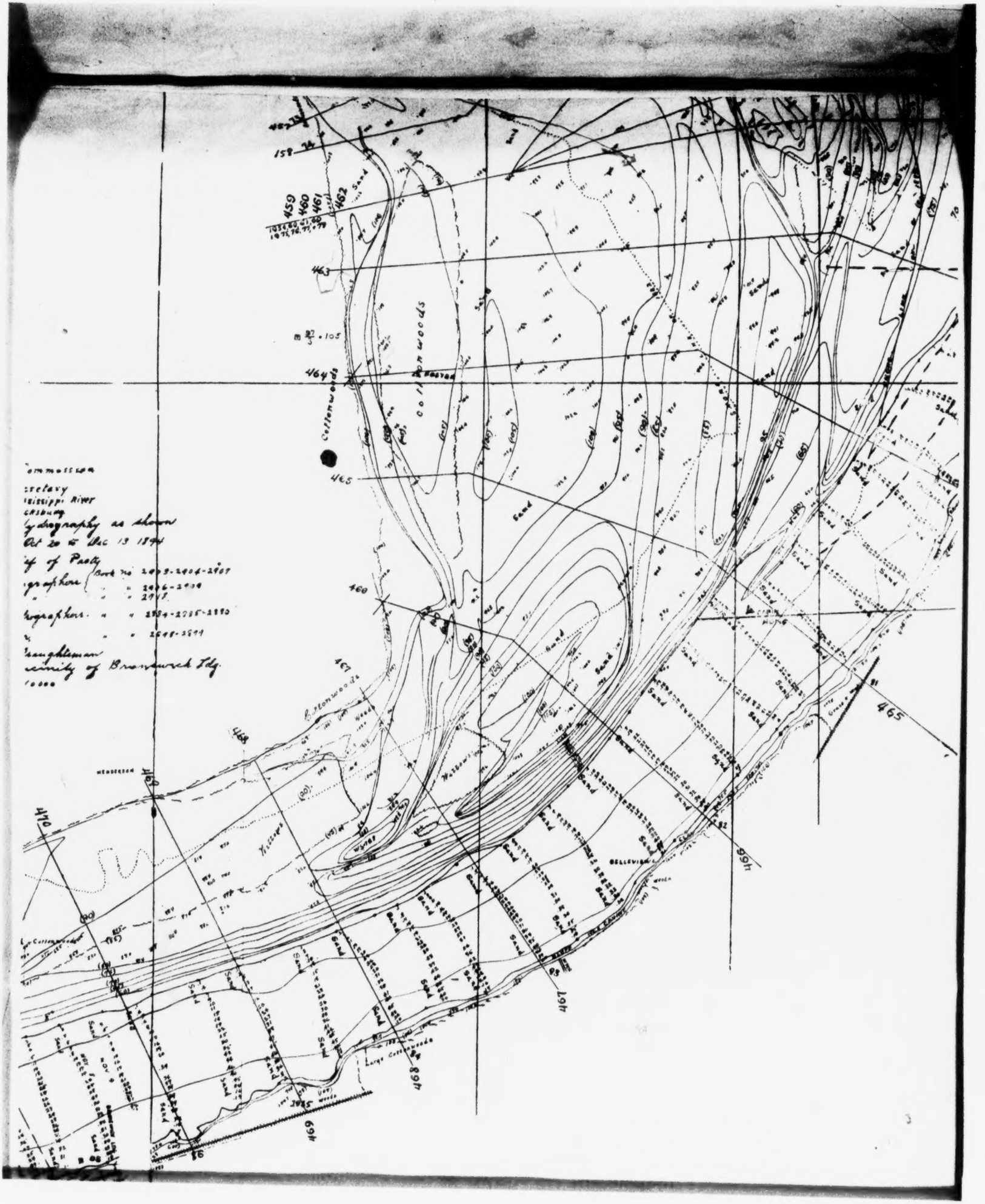
Mississippi River Commission Chart No. 47, survey
1913 and 1915, is the next map of that portion of the
ver here under consideration. This chart shows the same
haracter of detail as Chart 45 of the 1882 survey and
sheets 5, 5½ and 6 of the Mississippi River Commission
Survey of 1894. It shows that the river had returned to
its old 1882 channel, not, however, until parts of Sections
8, 9, 10, 15, 16, 17, 21, 22, and 29 T. 9 N. R. 8 W. had
caved into the river on the Mississippi shore, and all of
this territory not actually occupied by the bed of the river
had been added by accretion to Island 98, or "Newman's
Tow Head," so-called on the chart.

There is no postive testimony in the case showing how the river changed from its 1823 to its 1882 channel. The maps mutely testify to the radical change that occurred; the witnesses testify to the existing physical facts which circumstantially explain how it occurred.

There is no dispute between the testimony of the witnesses offered for the complainant and for the defendant with reference to what occurred subsequent to the making of the survey by the Mississippi River Commission in 1894, at which time the channel of the river was to the east of the location of Tullos Island as surveyed in 1823 and 1882. This testimony shows without dispute that from 1894 until 1912 the Mississippi River rapidly ate into the Mississippi bank and that the territory on the westward side of the river, originally surveyed as Tullos Island but at that time connected to the Louisiana shore by the old filled-up 1882 channel, rapidly built towards the Mississippi shore by accretion; that in 1912 or 1913 the river made a sudden change in its channel, cutting across the neck of the so-called towhead at the point where the old 1882 channel had been, scouring out the old riverbed and re-establishing itself there. The conditions shown on Mississippi River Commission Chart No. 47 are substantially as they are today, except that the 1894-1913 channel around the island has now become so filled up as to be unnavigable.

COMPLAINANT'S CONTENTION

It is only with reference to what took place between the making of the Mississippi River Commission Survey of 1882 and its survey of 1894 that complainant and defendant really are at issue. The theory of the complainant is set forth in its brief, pages 8 to 12, under the heading "Statement of Facts." This theory briefly is, and the evidence of complainant's witnesses tends to show, that the Louisiana shore gradually built by accretion in a northeasterly direction towards Mississippi, the river cutting into and encroaching on Mississippi territory as it gradually moved north and east, and the Louisiana shore progressively following the encroachment; that this con-


Commission
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Hydrography as shown
Oct 20 to Dec 13 1894
Chief of Party
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" " 2911
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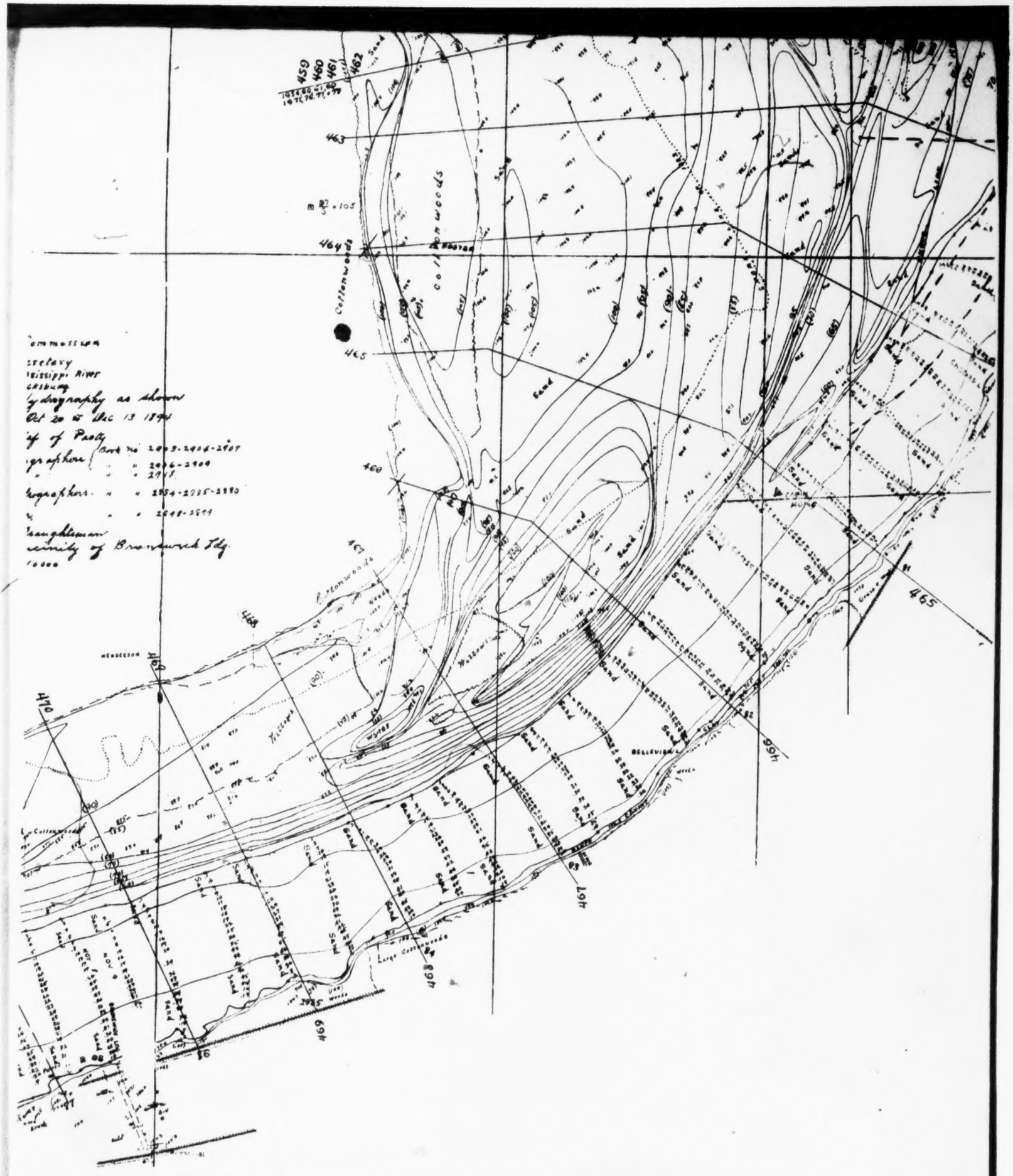
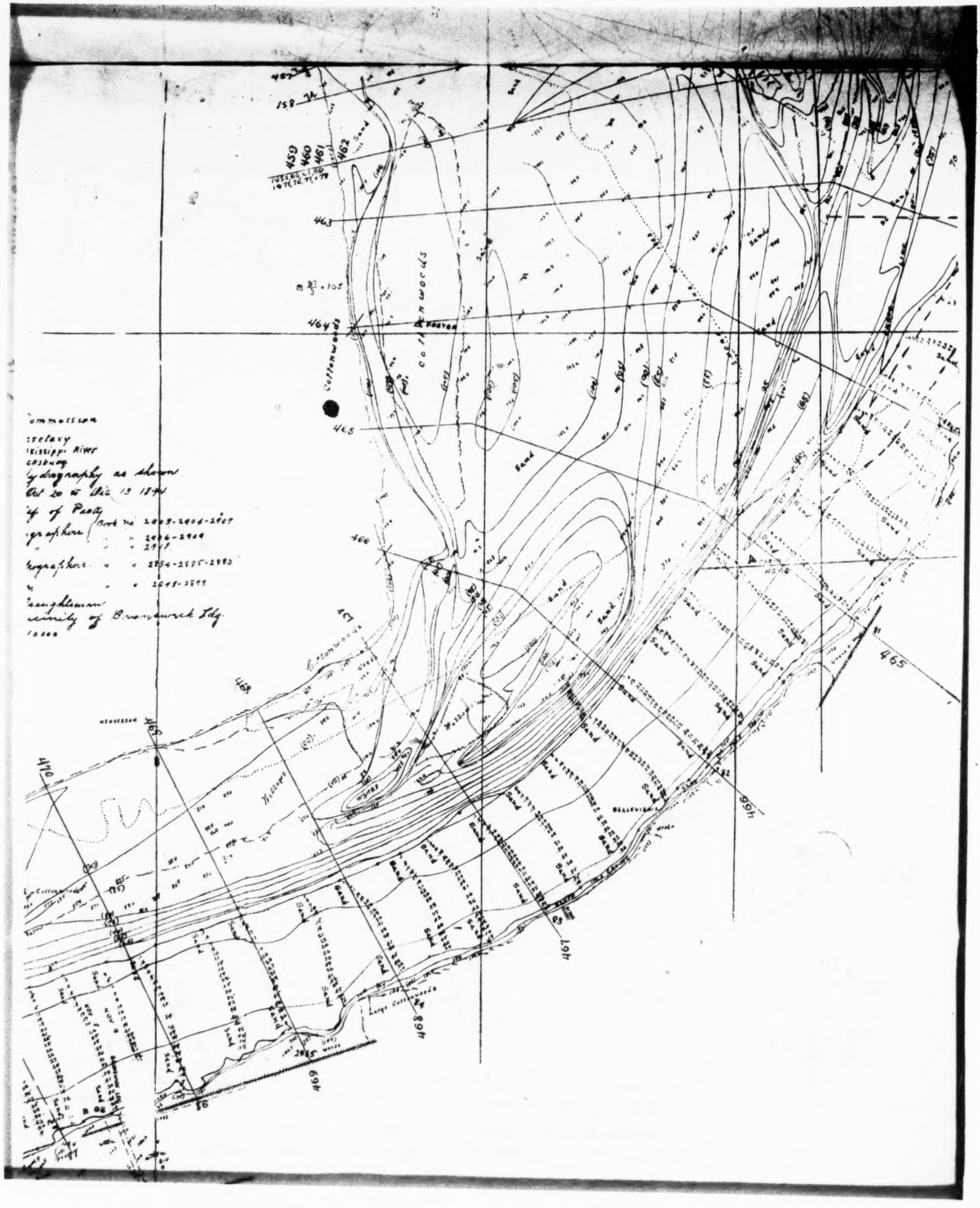


DEFENDANTS EXHIBIT 4A, SHEET NO. 5, MISSISSIPPI RIVER SURVEY OF 1894,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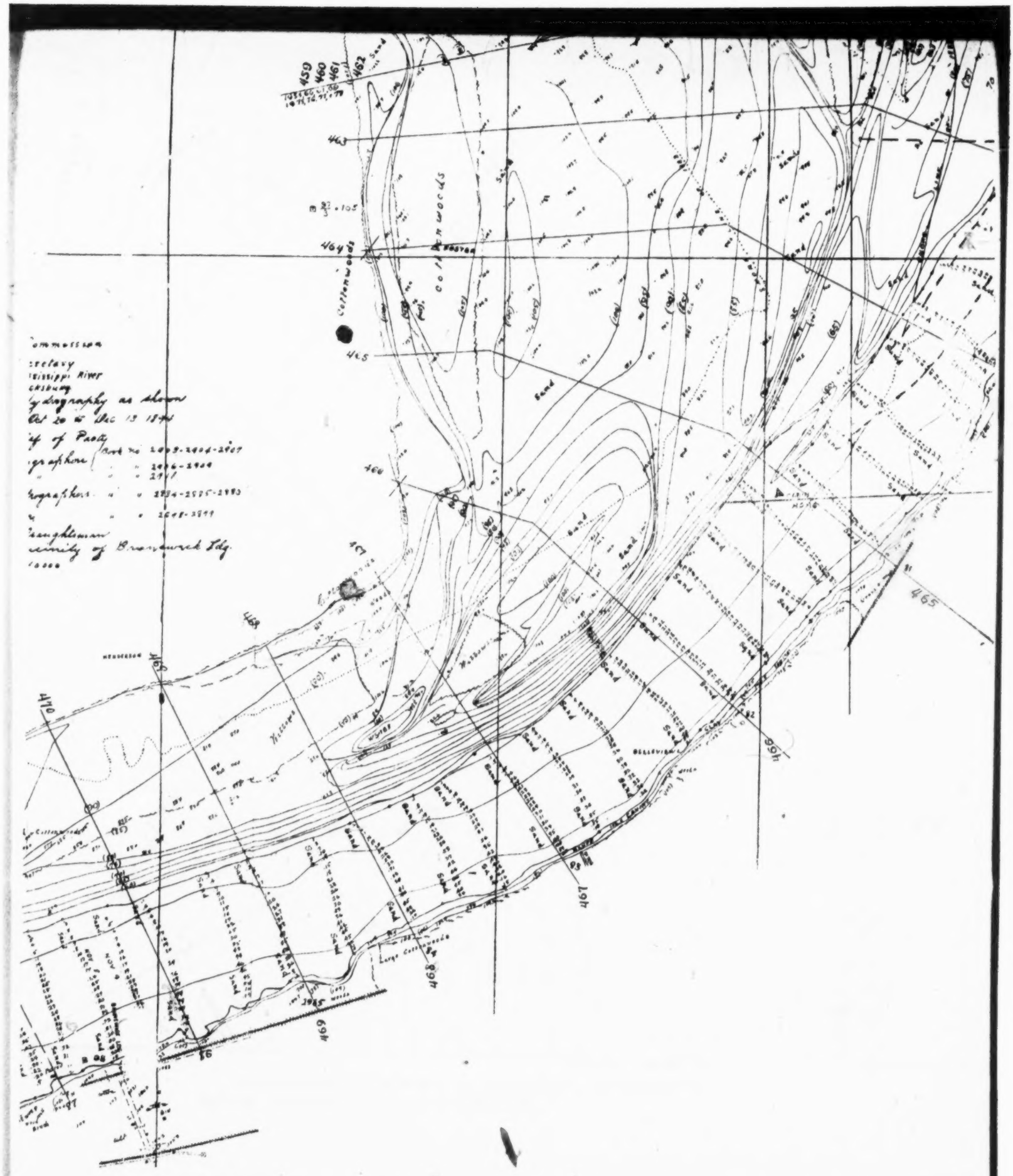

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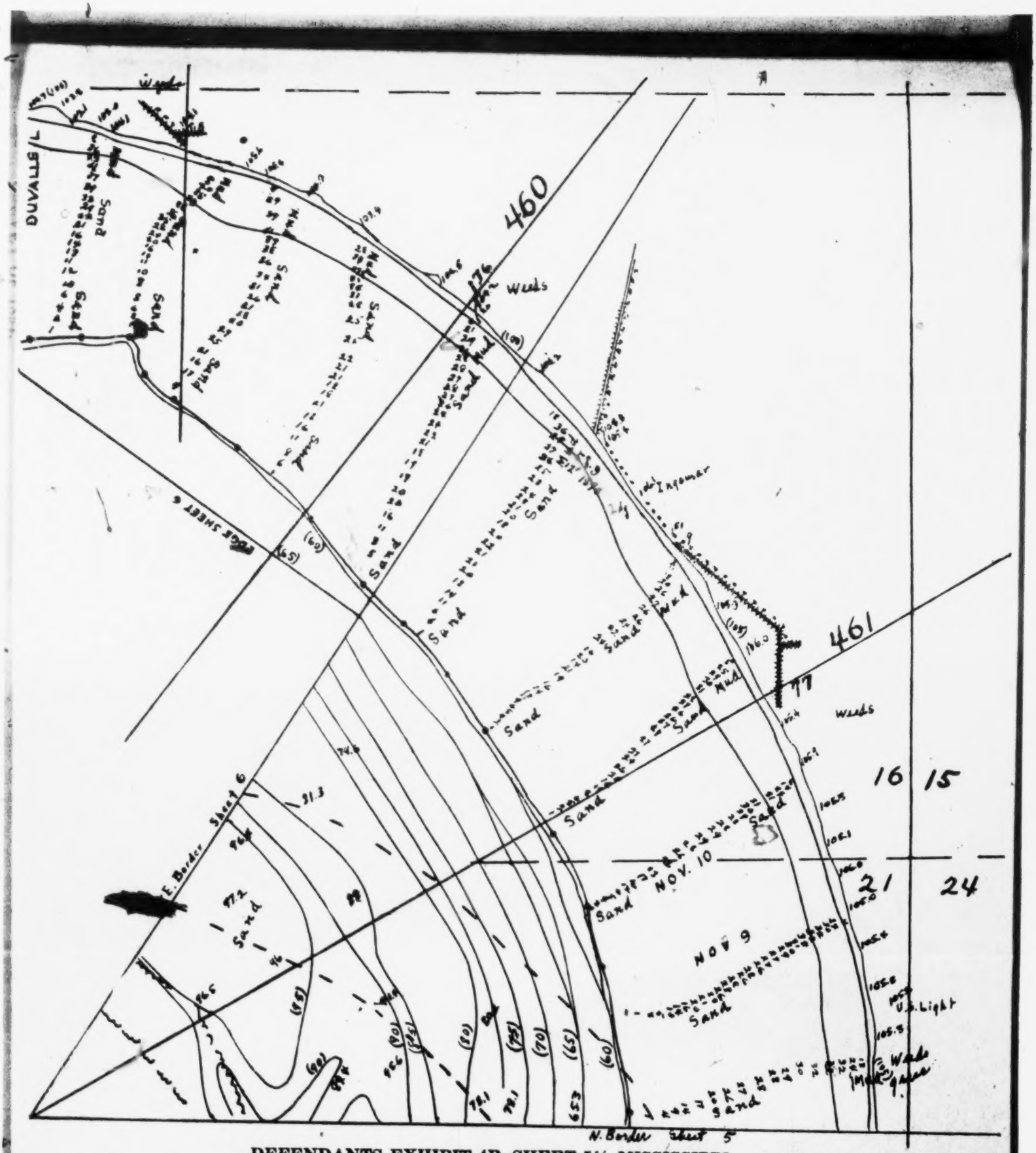
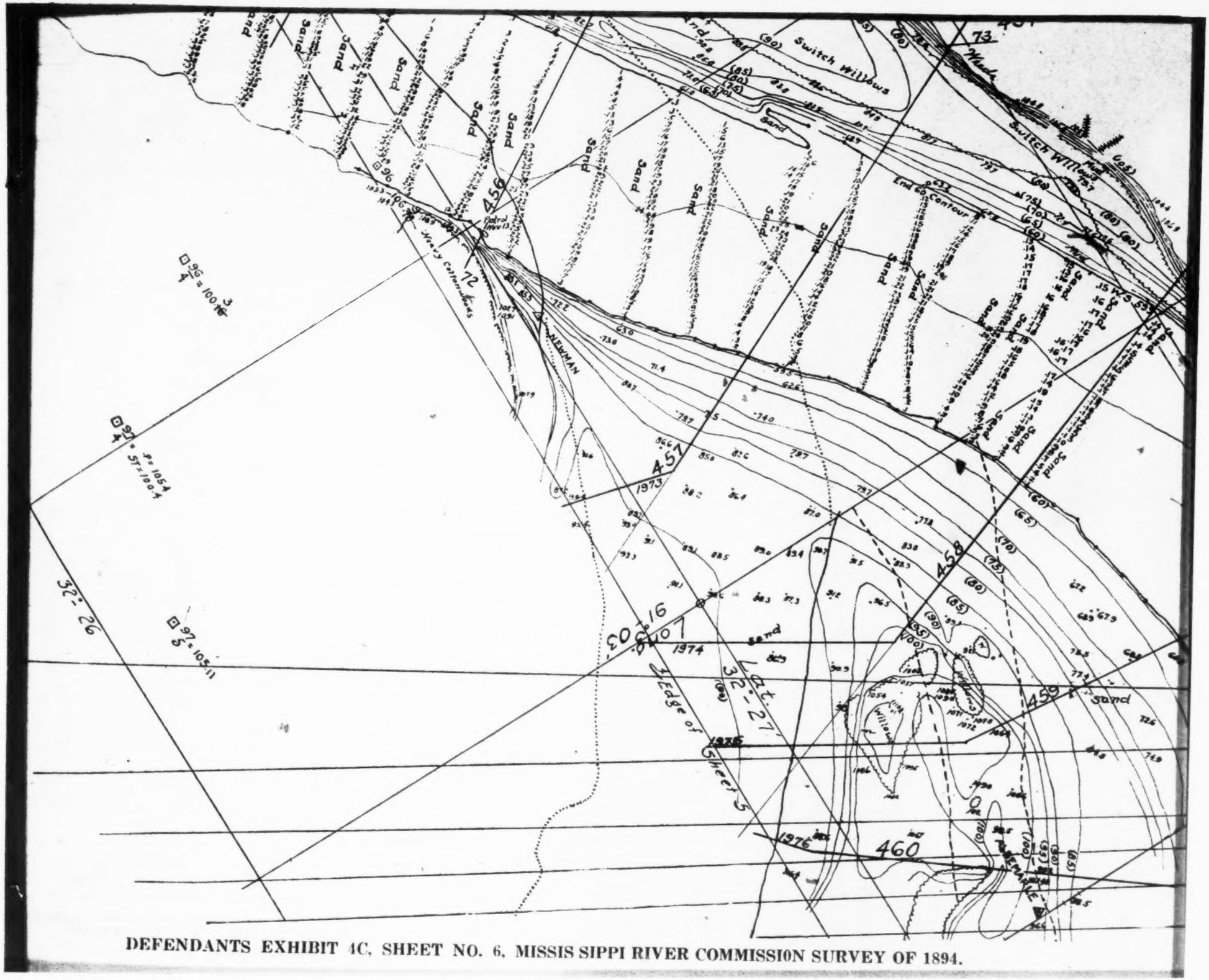
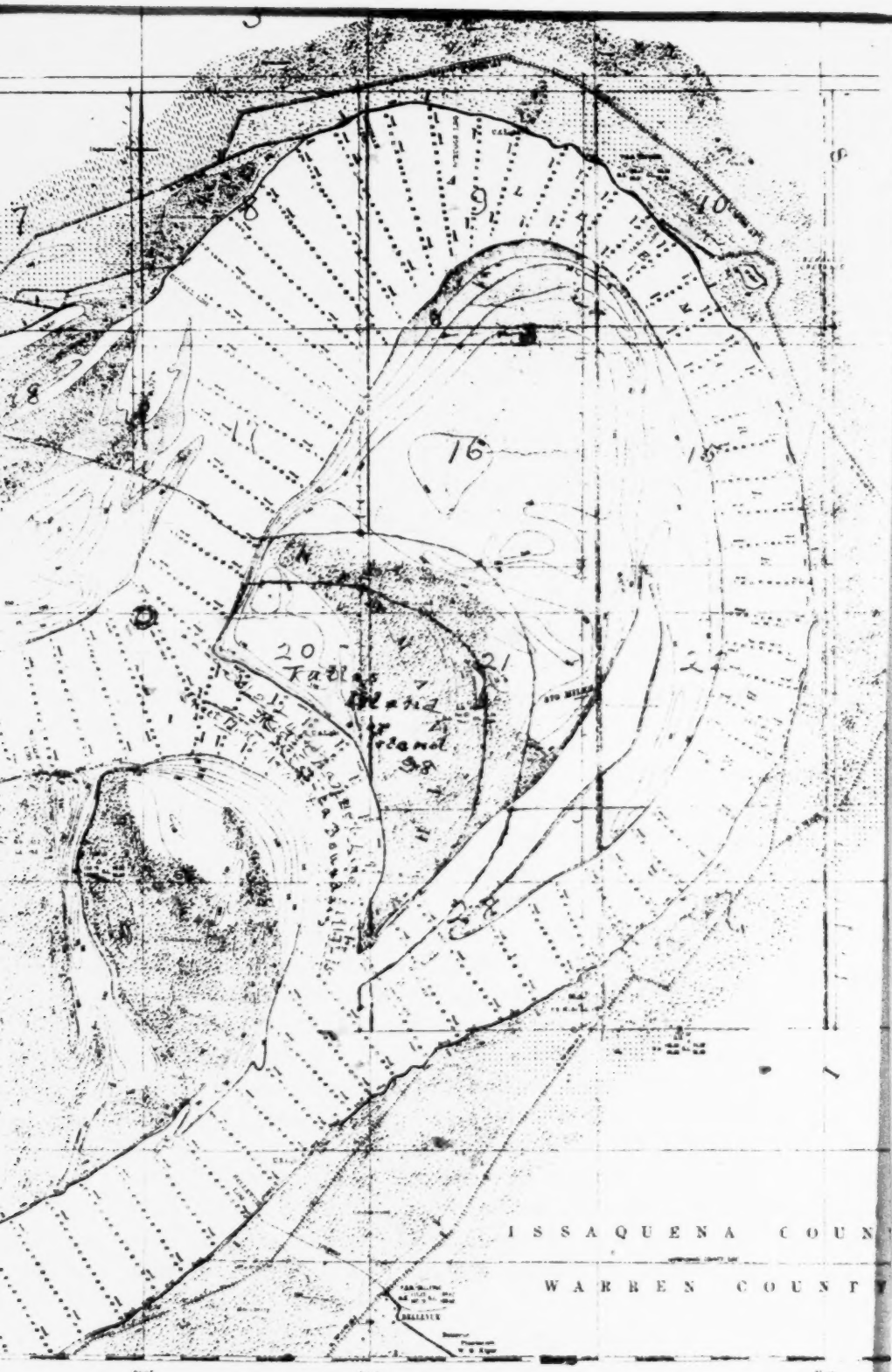


DEFENDANTS EXHIBIT 4B, SHEET 5½ MISSISSIPPI RIVER COMMISSION SURVEY OF 1894.



DEFENDANTS EXHIBIT 4C, SHEET NO. 6, MISSIS SIPPI RIVER COMMISSION SURVEY OF 1894.



"DEFENDANTS EXHIBIT 6-D, CHART 47, OF MISSISSIPPI RIVER COMMISSION SURVEY OF 1913-15."

dition continued until all of Tullos Island, and much of the Mississippi mainland, was washed away and until the Louisiana shore by accretion had built over the location formerly occupied by Tullos Island and had extended its northeastern limits about one and one-half miles east and north of the original eastern boundary of Tullos Island.

DEFENDANT'S CONTENTION

The State of Mississippi bases its defense on two propositions:

1. Prior to 1882.

The complainant has failed to prove that the Mississippi River gradually moved eastward from its 1823 channel to its 1882 channel, and that the Louisiana shore line progressively followed it by accretion. This being true, the direct and positive testimony of witnesses showing that accretions attached to the west shore subsequent to the year 1882 wholly fails to prove that such accretions became attached to territory belonging to the State of Louisiana. The complainant, State of Louisiana, has failed to establish its base: its starting point.

2. Subsequent to 1882.

It is the theory of the defendant and its proof tends to show that subsequent to the year 1882 the Mississippi River above and to the west of Willow Point cut into the Louisiana shore deflecting the course of the current from a southeasterly direction to a northeasterly direction; that because of this deflection in its course, the river cut around the head of and to the north and east of what was left of Tullos Island, scouring out the old chute between the Island and the Mississippi shore; and making a new channel there; that the old bed of the river filled up so that Tullos Island became attached to the Louisiana shore; that the river continued to cave the Mississippi shore, adding to the island by accretion until the year 1912 or 1913, when it suddenly abandoned its new channel and went back to the old 1882 channel, leaving Tullos Island again in truth an island, but greatly enlarged by the accretions added thereto.

ANALYSIS OF THE EVIDENCE

For the purposes of this argument, the evidence introduced on the trial of this cause will be treated in three subdivisions:

First, that dealing with the changes in the Mississippi River at the point in question, between the time of the original governmental land survey of 1823 and 1824, and the Mississippi River Commission Survey of 1882.

Second, that dealing with the changes in the river between the time of the Mississippi River Commission Survey of 1882 and the Mississippi River Commission Survey of 1894.

Third, that dealing with the changes occurring in the river subsequent to the 1894 survey.

As has been previously stated in this brief, the maps introduced in evidence show that between the years 1823 and 1882 the river in the vicinity of Willow Point had moved to a new channel about a mile and a half East of its 1823 location. There are no witnesses to testify from personal observation or knowledge whether this change from the 1823 channel to the 1882 channel was the result of an accretion or an avulsion. The testimony of all the witnesses is given relative to conditions and changes occurring since 1882, complainant's witnesses testifying to accretions to the Louisiana shore line as it then existed (subsequent to 1882) and the gradual shifting of the river towards the Mississippi shore. If the river had in fact gradually moved Eastward from its 1823 to its then channel and the Louisiana shore as a result of accretion had followed it, then the testimony of complainant's witnesses relative to accretions subsequent to that time, shows them to have become attached to Louisiana territory even though the Louisiana shore line was then a mile and a half East of the line as originally surveyed in 1824. On the other hand, if the change in the channel of the river between the years 1823 and 1882 was the result of an avulsion, the testimony of complainant's witnesses has only shown that the accretions were attached to land then on the Louisiana side of the river, but land which in fact belonged to Mis-

sissippi. With these preliminary remarks, the evidence will be discussed and analyzed in the order above set forth.

FROM 1823 TO 1882.

Complainant's Exhibit "M," Mississippi River Commission Chart No. 45, Survey of 1882, with the 1823 and 1824 governmental land surveys superimposed on it shows the difference in the location of the channel of the river in the years 1823-24 and the year 1882. Chart 47, Survey 1913-15 shows the channel of the river to be in identically the same location as in 1882. R. p. 183, 184. These charts show in detail the topography of the land now on the Western mainland lying between the 1823 shore line and the 1882 and 1913 shore line. A depression slightly to the East of the location of the 1823 channel, not named on the charts, but locally known as St. Francis chute, is clearly shown on each of them. Witnesses both for complainant and defendant show this depression to be the old filled-up 1823 river channel.

The testimony of the complainant's witness, George Prince, shows that he is familiar with this old 1823 channel. R. p. 39.

The complainant's witness, George Newman, is also familiar with this channel; his testimony showing that it runs in a Northeasterly direction from about Hendersons until it reaches the present river channel at about Willow Point. R. pp. 55, 56, 58, 59 and 60.

Defendant's witness, Lawrence Townes, testifies that he is familiar with this old river channel: St. Francis Chute; that it is on the Louisiana mainland and runs in a southerly direction down from Mrs. Newman's plantation, (Willow Point). R. p. 232 and 233.

The defendant's witness, Etna J. Albrittian, is the owner of some of the land in controversy under the Mississippi patents. He has closely investigated the lands, had them surveyed, and gone over them with the surveyor. With reference to the St. Francis Chute, or the old 1823 channel, the witness in substance, testified as follows:

That in October, 1924, with the river stage at 38.9 at Vicksburg, the water was backed out into this old river channel. He followed it from Hendersons until he reached the river at Willow Point, finding it filled with water the entire way. The bank line of this old channel was clearly discernible most of the way, the banks showing about ten feet above the level of the chute. This chute or channel was shown by the survey to be in the same location as the channel of the river in 1823. R. p. 245, 248, 251.

Complainant's proof tending to show that the change in the channel of the river between 1823 and 1882 was the result of accretion and not of avulsion is supplied only by one witness, C. H. West. His testimony is based upon two maps, one of which was made in 1866 and the other in 1870. The 1866 map was not introduced in evidence, but the witness shows by his Exhibit "G" the bank line on the Louisiana shore, presumably taken from this map. R. p. 147.

The other map introduced as an exhibit to this witness's testimony was a survey of what is known as Hopkins Island, as it existed in 1869-70. Comp. Exhibit "BB". R. p. 148.

With these maps as the only facts before him the witness undertakes to give a history of the change in the river during this period of time, expressing as his opinion that the river progressively moved Eastward and the Louisiana shore line followed it, being built by accretion. It should be kept in mind that there is no competent evidence of the 1866 survey and that the 1869-70 survey of Hopkins Island did not undertake to be a survey of either the Mississippi or the Louisiana shore line, but only of the island itself. It should also be borne in mind that none of these maps, except the 1882 survey showed the topography, the contours or elevations of the ground. The testimony of this witness is merely his opinion based only on the fact that the shore line in the different years was East of its former location.

FROM 1882 TO 1894

In explaining how the river changed from the 1882 channel to the 1894 channel, the complainant's witnesses at-

tempted to establish the fact that Tullos Island completely washed away, and that the Louisiana shore progressively followed the river to the Eastward by accretion, as the Mississippi shore and the Island caved into the river.

Complainant's witness, T. B. Beard, a brother-in-law of Walter Newman, the owner of Willow Point Plantation, has been familiar with the territory in controversy for about fifty years. At the time of his earliest recollection, a bar extended out from Willow Point about a mile and a half, or two miles, and continued to grow year by year until, in 1912, it was three or four miles from the mainland. R. p. 87 and 88. He denies the existence of Island 98 during this period of time. R. p. 89, 95.

Complainant's witness, E. T. Purnell, moved to the Purnell plantation opposite Island 98 on the Mississippi River in 1880. R. p. 260. The channel of the river was then on the West side of Island 98 with a chute between the Island and the Mississippi shore. R. p. 262. Island 98 was caving on the West side and finally disappeared in 1893, '94 or '95. R. p. 264, 282.

During this period of time the Louisiana shore was building out toward Mississippi. R. p. 265. Between the towhead and the mainland there was a depression through which in high water the boats would make a cut-off. R. p. 268, 269.

N. B. Captain Marshall's testimony shows this depression to be the old filled-up 1882 river channel.

The witness is familiar with Hopkins Island, describing it as being Northwest of Island 98. Hopkins Island did not wash away, R. p. 275, but the channel of the river changed around it. R. p. 276.

N. B. What this witness called Hopkins Island is shown conclusively by him, in referring to the map, Comp. Ex. "H" to be upper Tullos Island. R. p. 277.

Joseph V. De La Hunt, witness for the complainant. A steamboat captain and familiar with the river at the point in question since 1880. Island 98 disappeared. R. p. 289, 292. Is familiar with Hopkins Island, the channel of

the river being between it and Island 98; west of Island 98 and east of Hopkins. R. p. 292-298.

Hopkins Island never washed away. It was there in 1908. R. p. 298.

N. B. What this witness designates as Hopkins Island was evidently upper Tullos Island.

Captain Charles H. West, member of the Mississippi River Commission since 1910. (R. 129.) His first observation of the river at the point in question was in 1893. R. p. 156. Has been thoroughly familiar with the river there since 1898 when he was appointed Chief Engineer of the Mississippi River District. R. 130. The witness explains the various maps and blue prints attached as exhibits to the original bill of complainant, and with them as a basis undertakes to give a progressive history of the changes in the river. He testified that the river gradually ate into Tullos Island and the Mississippi shore and that the Louisiana shore progressively followed it, being built by accretion. That this condition continued until all of Tullos Island was washed away and the Louisiana shore had built over its former location; that then by a sudden change in the course of the river a new channel was cut across these accretions, leaving them an island.

In giving his testimony the witness considers only the shore lines drawn on the maps, giving no consideration to the elevations and contours shown thereon. R. p. 140. He attempts to explain why, in preparing his blue print Exhibit "I," showing the changes in the river during this period of time he ignored the topographical details shown on the map from which his exhibit was prepared, and in the location where the islands were shown on the map, wrote in the word "accretion." As to the soundness of his explanation, the court may best judge by reading it. R. p. 155-156.

The witness denies that there was a general topographical survey of this territory made in 1894, but admits that the original field notes of this 1894 survey are on file in the office of the Secretary of the Commission. He states

that these field notes will show only the 1894 shore line. R. p. 157, 158.

N. B. The witness is conclusively shown to have been mistaken in these statements by the testimony of Captain Marshall who obtained from the Commission and introduced in evidence, blue prints of the original field or work sheets of the 1894 survey showing all details of topography, contours, and elevations on the land and soundings in the river.

William Miller, witness for defendant. A colored man born in 1875. Lived on Eustacia plantation directly in front of Island 98 until ten years of age. Island 98 had 250 acres. R. p. 302. Moved to Brunswick, eight miles below Eustacia, stayed there ten years, visiting back at Eustacia every week. R. p. 310. Moved to Vicksburg, stayed there from 1897 to 1916, working as a roustabout on the steamboats, "Annie Laurie," "Ruth," "Chattahoochie," "Belle of the Bend," "Ben Hur," "Cardee," "Webb Oliver." Passed the island six times a week. Island 98 never washed away, although all but about 75 acres of the upper part did cave into the river. R. p. 304. A part of the island was in cultivation, a man by the name of Scruggs living on it. R. p. 305-306.

Lawrence Towns. 59 years of age. Colored. Lived at Chotard in 1880. Familiar with Island 98 which he called Scrugg's Island. Also with Hopkins Island. R. p. 220. The witness leased the island and raised hogs on it, eight or nine hundred head. R. p. 225-227.

The witness is familiar with what he calls Hopkins Island, it being just a little to the north and west of Island 98. R. p. 231-232.

Was a roustabout on steamboats for ten years, passing by Island 98 three or four times per week. R. p. 220. The channel was on the west side of the island except in high water. A part of the island washed away, but not all; some of it is still there. R. p. 221-222.

R. E. Foster. Age 75. Member of the Legislature. Owns three places, the lower place in sight of Tullos Island, or Scruggs' Island. Has lived there since 1882. Island 98

never completely washed away. R. p. 209, 210. The channel changed frequently at this point. R. p. 211.

E. J. Albrittain. Is thoroughly familiar with the territory in question, especially as to the physical conditions existing. Holds Mississippi patents to some of the land in controversy. R. p. 243. Went over the land in 1924 with a surveyor. R. p. 256, 257. The witness with the surveyor located the old chute line between the Island and the Mississippi shore in 1823. This channel was clearly discernible in the same location as the old chute in 1823 with lakes interspersed through it. He followed it to where it runs into the present river channel. R. p. 245, 246.

The territory to the West of this old chute line, running up to the river on the West and paralleling the old chute line on the East, is covered with large cottonwood and willows. R. p. 243. This area between the old chute shore line and the present channel of the river is composed of clay soil. The river bank there is about 25 feet high. The largest timber on the Island grows on this high ground, and immediately East of the old chute the growth is of small willows. R. p. 244. The character of the soil and the character of the timber here is the same as that on the old Mississippi mainland. R. p. 252.

Captain H. M. Marshall. Civil engineer since 1877. Lives at Vicksburg. Has been in the employ of the United States Government for forty years. Has been in the United States Engineer's office at Vicksburg from 1888 until 1924. R. p. 168 and 169. Is thoroughly familiar with the territory in question. There in 1890, in charge of the levees in that immediate vicinity. R. p. 175. The witness first refers to Sheet 17 of the Mississippi River Commission—Complainant's Exhibit "C"—showing Island 98 divided into two parts. R. p. 171.

In 1890, during the high water, witness was in charge of the levees in this territory, and both parts of the island were there then. He saw the mail boat come up the chute between the mainland and the islands. R. p. 185.

The witness next introduces Exhibits 4-A-B and C, three

blue prints of field sheets numbers 5, 5½ and 6 of the Mississippi River Commission Survey of 1894, certified to by the Secretary of War as correct and official maps. The scale is 1:10,000 and the maps show the same character of detail as Chart 45 of the 1882 survey.

N. B. Captain West in his testimony denied the existence of these maps. Counsel in their brief evidently blindly followed Captain West's testimony, denying and ignoring their existence.

Captain Marshall described the topographical details shown on these maps, showing that at the time the survey was made in 1894, there was high ground of the same elevation, or a slightly higher elevation, than Tullos Island in 1882 and located in identically the same place as the islands were at that time; that to the West of this high ground and at the place where the channel of the river was situated in 1882, there is low ground from twenty to twenty-five feet higher than the water level. R. p. 172, 173:

> "A. Exhibit 4-A, in the upper hight hand corner, shows high ground, an elevation of 110, Memphis data. The line (fol. 257) running around the high ground shows the timber line. This high ground is on the Western side or towards Louisiana of the Mississippi river. This 4-A is sheet No. 6 of the blue print issued by Mississippi River Commission, certified by the Secretary of War. It is joined to sheet 5½ of the same survey and blue print marked Exhibit 4-B. On that 4-B the high ground extending down the river with the timber line marked thereon. Sheet 5½ of 4-B is continued down the river on Sheet 5. This sheet shows a continuation of the high ground down the Mississippi River with the timberline marked thereon. On these three sheets elevations are written, referring to Memphis data. They give the height of the ground. Height of the ground, as I have stated, is 110 at the upper end, and—
>
> Q. (Interposing.) The upper end of what?
>
> A. The upper end of the island. And it runs off

down to various numbers, 104, 108½, 107.4, 104.3, 109.5 —various numbers. That is on the high ground.

Q. That is Tullos Island you are talking about?

A. Yes, sir. To the West and at the upper end of Tullos Island are various numbers, giving the elevations—86.4, 86, 89, 85, 86, 90, which it will be noticed, the 90 is 20 feet lower than the 110. On the lower end of Tullos Island the figures written to the West of the Island, run 81, 85, 82, 84 and 95. On these three sheets the shore line of 1882 is (Fol. 258) marked along the Western limits or Western edge of Tullos Island. On the Louisiana side the bar line of 1882 is marked. To the East of this Island, is shown the channel of the Mississippi River at the time this survey was made in 1894.

Q. Is there anything else shown on that map, Exhibit 4, A, B, C, which would indicate the change of the main channel of the Mississippi River?

A. The fact that the Island elevation is over 100, which is about the elevation of the bank line on the Mississippi River shore. The location of the channel of the Mississippi River East of that high land shows that the River had gone around the upper end of the Island and was flowing to the East of the Island.

Q. Does that show that the Island was washed away or still there?

A. The Island could not have been washed away." And again on pages 173 and 174:

"Q. I don't know whether you have stated it or not, but is there anything else shown on the map which would indicate the change of the main channel of the Mississippi River?

A. The fact that the Island elevation shows a reading of 110 feet, and the water survey on the shore line shows a reading of 60 feet, is absolute proof of the fact that the Island was 50 feet above the water surface at the time of the survey, with trees growing on top of it. I can state of my own personal knowledge that in 1890,

four years before the survey was made, that Island 98, or Tullos Island, the island above it, had not been washed away, but was still in existence. Of course, everybody knows that (Fol. 260) an island cannot be washed away and then four years later be built back with big trees growing on it, as shown by this survey. There is another thing I want to show you. Up stream from this island shown on Exhibit 4-A, and Westward to the Louisiana side, the elevations of the ground surface are 20 feet lower than the elevation of the island, that is, the ground West of the island is 20 feet lower than the surface of the island. This low ground to the West of the island is in the location of the Mississippi River in 1882, which shows that the Mississippi River had gone around the head of the island and over to the East, and a bar had formed from the Louisiana side over to the head of the island. If the island had washed away and the accretions made from the Louisiana shore, this low ground could not have occurred if the Mississippi River had gradually moved over towards the State of Mississippi, building an accretion on the Louisiana shore. That accretion would have been adjacent—would have been higher adjacent to the Louisiana shore, and lower as the accretions were formed from year to year towards the Mississippi shore." (R. 173 and 174.)

Captain Marshall correlated the three blue prints 5, 5½ and 6 on one sheet, making a tracing so as to show on this tracing in one sheet, the location of the high ground, or islands, and the low ground to the West. On this tracing, the witness superimposed the section lines. He also prepared another tracing reduced to the scale of the Mississippi River Commission Charts No. 45 and 47.

"A. I have prepared a tracing from blue prints—from the three blue prints shown as 4-A-B-C, so as to put the river in that vicinity on one drawing and have marked the tracing Exhibit 4-A-B-C, on the lower right hand corner.

Q. All right, what does that show?

A. It shows in a clear way then what I have stated with regard to the blue prints. It is, as far as it goes, a fac simile copy of the lines and figures on those three sheets, 4-A-B and C. On that tracing, which is on a scale of 1 to 10,000, the scale on which the Mississippi River Commission surveys are platted in the St. Louis office, on these tracings I have drawn the section lines in this vicinity, showing sections 16 and 17 and some of 20, 21 and 28, covering Tullos Island as Island 98 and the Mississippi adjacent shore. Also on that tracing I have marked two lines in blue pencil along which I have written the North border of sheet No. 5, and the Southeast border of sheet No. 6, so that these tracings may be fitted over the blue print sheets to (Fol. 273) show that they are identical.

Q. You say the blue print sheets are what?

A. They are 4-A-B and C.

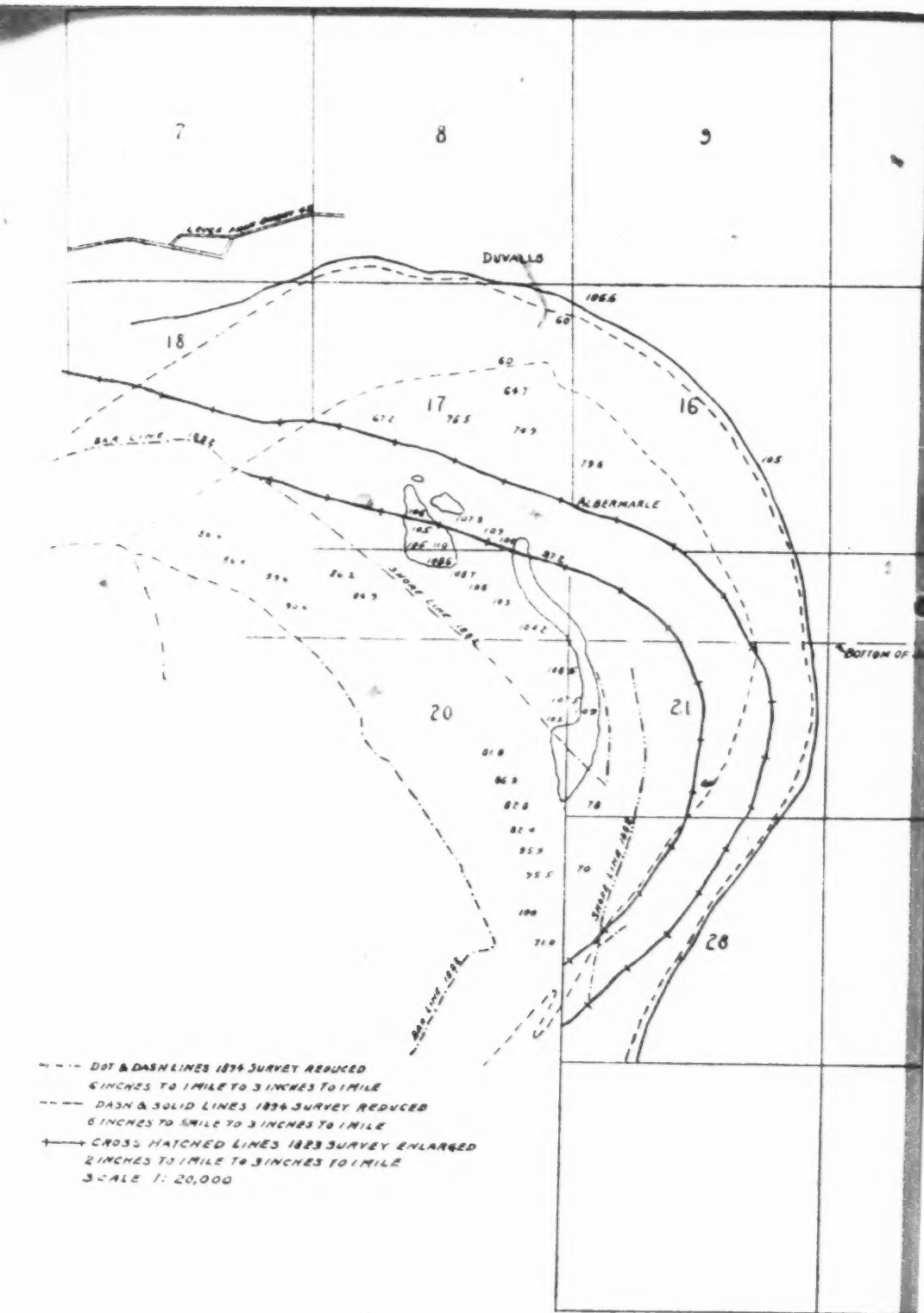
Q. From that then what, if anything?

A. In order to reduce this survey sheet 4-A-B and C from the 1, to 10,000 scale to the 1 to 20,000 scale, which is the scale on which the maps of the Mississippi River Commission are printed, I have prepared a tracing reduced to one-half size, otherwise identical with the tracing of Exhibit 4-A-B and C. This second tracing is marked in the lower right hand corner "Reduced from Exhibit 4-A-B and C."

Q. What does it show?

A. The same thing. It is a fac simile of the other tracing except as to size. It is one-half the size.

Q. You will call that exhibit what?



DEFENDANTS EXHIBIT 4D, TRACING REDUCED FROM EXHIBITS 4ABC.

A. I will call one Exhibit 4-D and one Exhibit 4-E." (R. p. 176).

The witness placed the tracing 4-E over complainant's exhibit "I," upon which complainant's witness, C. H. West, had witten "accretion." The tracing when so placed with the section lines coinciding, shows the high ground in the same location as the island, and the low ground in the same location as the river channel of 1882. Page 178:

"Q. State whether or not the 1894 survey maps of the Mississippi River Commission shows the island, and sheet No. 17 shows the upper part of Island No. 98, or Tullos Island with the island above on the West, the bar line of 1894 on the Western shore?

A. Yes, sir; the bar line is on the Western shore of the Mississippi River. I will state it the other way around. The river is the Eastern end of the island.

Q. Where is the island shown?

A. The island is shown on the 1894 map which you have asked about.

Q. And you say that the only place that Captain West could have gotten the blue print which he made was from the survey of 1894 and the survey of 1883?

(Fol. 276.) A. Yes, sir.

Q. Go ahead now, Captain Marshall.

A. On the Western side of the channel of the Mississippi River marked on Exhibit "I," 'Mid-river distance, Mississippi-Louisiana,' at the spot where Captain West wrote 'accretions,' appears the location of the low ground shown on sheets 4-A-B and C, which I have previously described.

Q. That is shown by placing your Exhibit 4-E over Exhibit I?

A. Yes, sir; with the section lines on 4-E fitting over the section lines on Exhibit I.

Q. Does any other drawing or map which you have

seen, except this map, or No. 3 of C. H. West, lose sight of the Island?

A. No, I have not seen any of the maps except the Mississippi River Commission maps which have been under discussion, the 1 to 10,000, 4-A-B and C, the one-inch to the mile, 17, Exhibit 3, these are the only maps that I know of, except the one issued with the superimposed lines on Sheet 17, showing the 1894 line, from which, I presume, Captain West prepared his Exhibit I. None of those shown was accretion, and none of them have the island left off. The Sheet 17, one inch to the mile, with the superimposed red line of 1894, shows the lower part of the upper of the two islands, and the upper part of the lower of the two islands, or Tullos (Fol. 277) Island, surrounded by the red line to the West of the Mississippi River." (R. 178.)

The witness also compares Chart 45 of the 1882 survey and 47 of the 1913 survey showing that the channel in 1913 was in the same location as the channel of 1882. The witness then compares Exhibits 3 and 5 to the testimony of complainant's witness, C. H. West, and shows the same thing:

"Q. Marked Exhibits 3 and 5 to the cross-examination of Captain West?

A. One is Exhibit 5 and the other is Exhibit 3. These last two are the tracings from which the blue prints were made, that were sent to me by Captain West. When placed one over the other so that the sections coincide, the mid-river distance on the Exhibit 3 is right down the middle (Fol. 287) of the channel shown on Exhibit 5, confirming comparisons that I made on Sheet 45 and Sheet 46 of 1882 with Sheet 47 of 1913-15.

Q. If the river had gradually eaten away the Mississippi side, and had caused accretions to form from the Louisiana side across to the Mississippi side, is it probable that the river bed of 1813-15 would have been in the river bed of 1882?

A. Of course, everything is possible.

By Mr. Dale: Objected to by complainant as incompetent evidence, being purely and solely the opinion of the witness, without any reason for said opinion.

Ruling reserved by the Commissioner.

A. I have stated the facts as shown by the 1894 survey, with the old bed partly filled up with sand twenty to thirty feet lower than the top of the land on the Island. I have shown that the channel filled up with sand was identically in the same location as the channel in 1882; and I now here show that the channel of 1882 is in identically the same location as the channel in 1913-15. Now, put the three together.

Q. Now, have you made that showing from the maps of the Government?

A. From the official maps of the Mississippi River Commission." (R. p. 184 and 185.)

The witness refers to Captain West's testimony and shows its inconsistencies and explains how the survey of the Mississippi River Commission of 1894 disproves his theory:

"Q. Please refer to the blue print which is marked Exhibit I to the State of Louisiana, complainant, which is a map by Captain C. H. West, and state what that shows?

A. The most striking thing on there is the word 'accretions,' which is written on the bar, showing between the bar line of 1894 and the bank lines of 1866.

Q. You have read Captain West's testimony, have you?

A. Yes, sir; I have read his testimony."

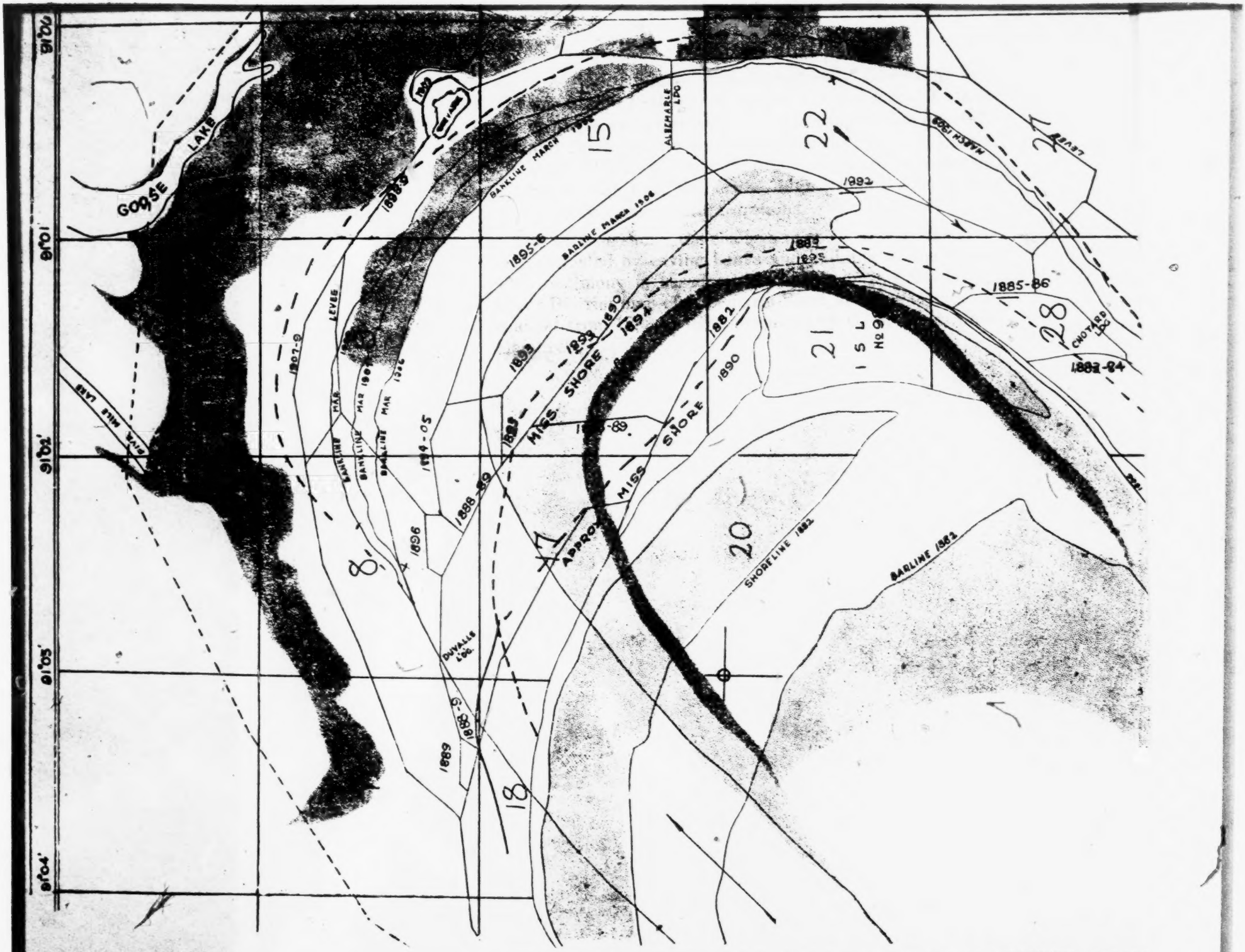
(R. p. 176 and 177.)

Bottom of page 177:

"Q. Is there anything in the Mississippi River Commission's Survey of 1894 that would justify designating this land on Exhibit I as accretions?

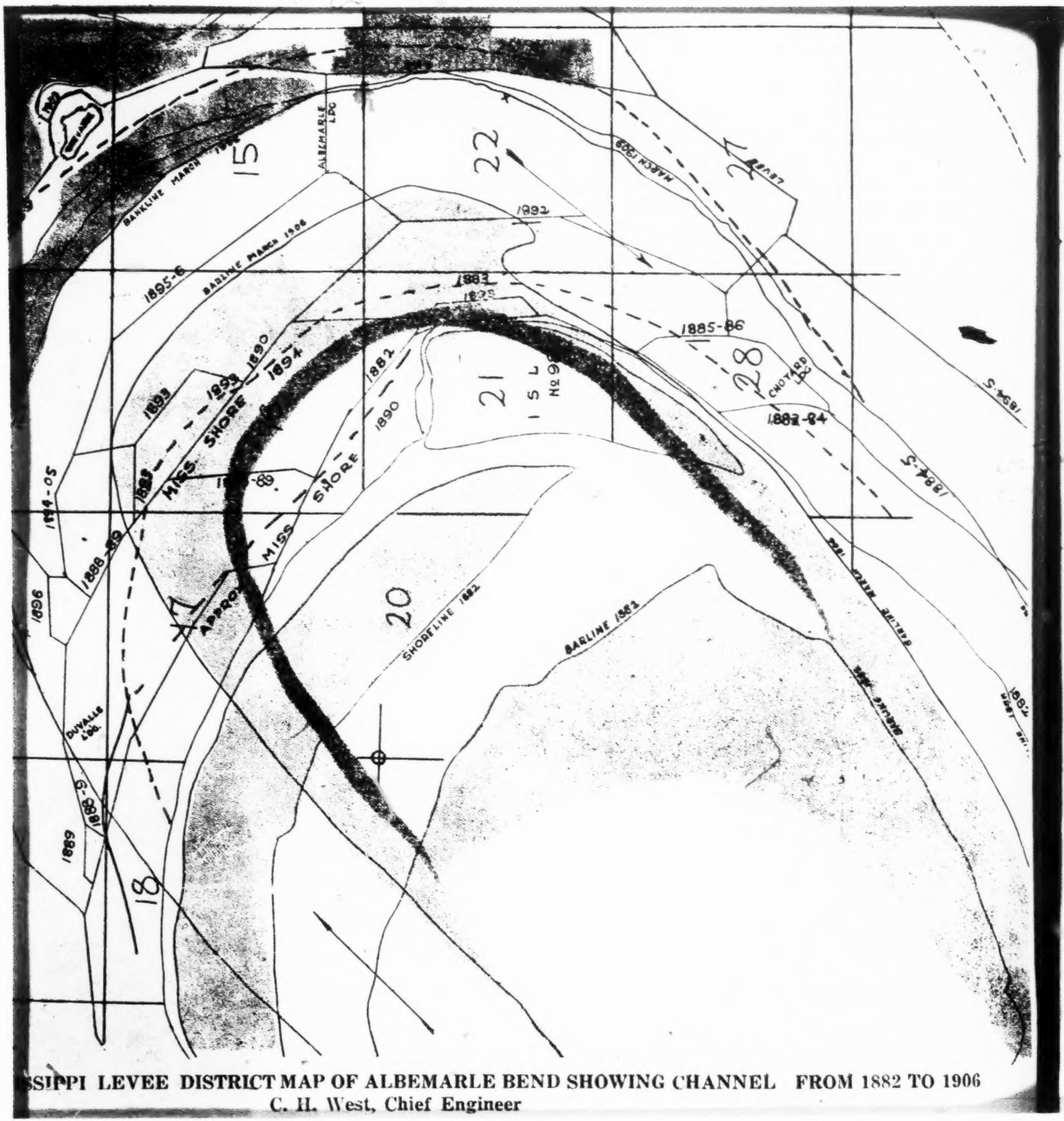
A. No. I have stated practically everything that was on the 1894 survey sheets, 4-A-B and C. I stated on there everything that is cognizant to this question, and there are no accretions marked there. I have studied them all, and there are no accretions marked there—bar line, timberline, high ground, low ground —nothing said about accretions.

The witness shows the changes in the course of the river as manifested by caving banks and building of the levees. This testimony is based on blue print of the Mississippi River District map of Albemarle Bend, showing changes in channel from 1882 to 1896, prepared by C. H. West, Chief Engineer.



"DEFENDANTS EXHIBIT 5, MISSISSIPPI LEVEE DISTRICT MAP OF ALBEMARLE BEND SHOWING CHANNEL FROM

C. H. West, Chief Engineer



SSIPPI LEVEE DISTRICT MAP OF ALBEMARLE BEND SHOWING CHANNEL FROM 1882 TO 1906

C. H. West, Chief Engineer

The testimony of this witness here shows that between 1882 and 1885 the levees were first built near the head of lower Tullos Island and later near its lower end, showing caving along the chute or near the head of the island, extending down in front of the main Mississippi bank about Chotard. The caving apparently stopped in this vicinity for several years, but by 1888 had begun above and behind to the North and East of upper Tullos Island, where a levee and run-around were built in 1888 and 1889. In 1890 another levee was built from the 1889 levee down to the head of the 1883 levee. This was followed in 1892 by a new levee from the lower part of the '90 levee to the levee at Chotard. This shows that from 1888 to 1892 a complete new levee was built around Albemarle Bend to the North and East of Tullos Island. R. p. 180, 181.

The testimony of this witness shows conclusively that Island 98 did not wash away but that because of some radical change in the river, its course was changed so as to cut around the North and East of Tullos Island to make a new channel in the enlarged chute.

FROM 1894 TO 1913

With reference to the conditions occurring subsequent to the year 1894, up to 1913, the testimony is undisputed that the Mississippi River rapidly caved into the Mississippi shore, adding to the Island or towhead by accretion, until it had built considerably East and North of the original Eastern boundary of Tullos Island. Since the evidence in this regard is not disputed, the testimony of the following witnesses will be discussed only briefly in this regard, but more fully with reference to their knowledge of the physical facts and conditions existing on the towhead or Island during this period of time.

Captain George Prince: Is a steamboat captain familiar with the territory in question since 1897. At the time of his earliest recollection the channel was between Newman's Towhead and the Mississippi shore with no island in the river. The towhead continued to grow by accretion towards the Mississippi shore. R. p. 25. The river broke through

the towhead in 1912, and the old channel filled up about 1916. R. p. 27 and 28. The largest timber on the towhead is in the Southeastern part, just West of Chotard. R. p. 38.

Ernest Newman: Born on Willow Point Plantation in 1888. Remembers the territory since 1897. At that time, the bar extended out towards Mississippi about three and one-half miles and continued to grow until the cut-off of 1912, '13. R. p. 52. Is familiar with the depression where the channel later came through. R. p. 63.

N. B. Captain Marshall shows this depression to be the old filled-up 1882 channel.

George R. Newman: Born on Willow Point Plantation in 1886. Remembers the territory in question since 1893. R. p. 66. There was a narrow depression between the mainland and towhead covered with sand. R. p. 68. The towhead continued to grow until the cutoff in 1912.

C. F. Hume: 64 years of age. Lived near Chotard from 1896 to 1907. Was thoroughly familiar with Tullos Island during this period of time, visiting it many times. R. p. 191. At that time, the Island was connected to the Louisiana shore by the old filled up 1882 channel. This old channel was interspersed with little lakes and was navigable in high water, the island during high water being cut off from the Louisiana shore, and boats going through the cut-off in the channel. R. p. 192.

Cottonwood and willows grew on the Island, being 40 or 50 years old and three feet in diameter in 1896. At the place where these big trees grew the land was 25 or 30 feet higher than along the old river bed of 1882. R. p. 193, 194.

In 1912 the river cut back across in its old 1882 channel. R. p. 194.

T. B. Beard: Familiar with the territory since 1876. The bar was then extended about one and a half miles from Louisiana and continued to grow until the cut-off of 1912.

Captain W. H. Reed: Steamboat man familiar with the territory since 1894. At that time a sandbar extended

about a mile from Willow Point. The towhead on this bar became prominent about 1900. There was another towhead inside the timber line. R. p. 104. Between the towhead and the old timber line there was a depression of white sand, navigated by small boats in high water. The cut-off came through here in 1912. R. p. 107.

N. B. Captain Marshall's testimony shows this to be the old filled-up 1882 river channel.

The witness is familiar with the place on the towhead where there is a marked bank ten or twelve feet high with cottonwoods growing on the top of it, and extending westward to the river. The soil in front of the bank is a new deposit with willows growing on it. R. p. 124, 125.

N. B. Defendant's witness, Albrittian, shows this high ground to be between the old 1823 chute line and the present river channel, and in the same location as Island 98.

Toward the head of the bar there is an old field grown up in bermuda grass. R. p. 125.

N. B. Chart 45, Survey of 1882, shows the North part of Island 98 to be cultivated land. This also accords with the testimony of Miller, R. p. 220.

WHAT THE EXHIBITS SHOW

Defendant's exhibits A-N, R. pp. 162-168 (not printed), were placed in evidence for the purpose of showing that from the time of the earliest governmental surveys, the State of Mississippi had exercised acts of dominion over and claimed as its own the property here in question. The State of Louisiana neither exercised, nor attempted to exercise in any way, dominion or control over such property at any time between the date of the earliest survey and the present time.

Defendant's Exhibit "A" is a certified copy of the land assessment rolls of Issaquena County, Mississippi, covering assessment of the lands here in controversy from the year 1848 to the year 1926. During this entire period of time, these lands were assessed by Issaquena County for taxation and appeared on its tax assessment rolls. The assessments

show that the property, and especially Island 98 or Tullos Island, during the period of time in which the State of Louisiana claims the island to have been completely washed away, that is, between the years 1882 and 1894, was continuously assessed on the tax rolls of that county. These assessments also show by the varying number of acres assessed that the ravages of the river on the island were considered.

During these years, the assessment rolls assessed that part of the original Tullos Island then in existence. During this period of time, a part of sections 20, 21, 28 and 29 were assessed. The assessment roll shows that during this time these lands, in fact, were an island and on the rolls in a number of cases, after the sectional description of the lands appears the word "island." The number of acres comprising the territory assessed varied from year to year, as new assessments were made. At no time during this period do the assessment rolls leave off all of the territory originally surveyed as Tullos Island.

Defendant's Exhibit "B" is a certified copy of the record of lands sold to the State of Mississippi for delinquent taxes in Issaquena County, covering the territory here in question. This exhibit shows that in the years 1869, 1879, 1880, 1881, 1888, 1890, 1891, 1895, 1897, 1898, 1900, 1901, 1902, 1906, 1907, 1912, 1915, 1922, 1923, 1924 and 1925 part of the lands here in controversy were sold by the State of Mississippi for delinquent taxes.

Defendant's Exhibits, "G," "H" and "I" are certified copies of the assessment roll of East Carroll Parish, Louisiana, showing assessment of Willow Point plantation for the year 1876 to 1926. These assessments show that the State of Louisiana during this period of time assessed for taxation no part of the land here in controversy, either as lands originally surveyed, or as lands attached by accretion to the original survey of the township in which Willow Point was located. These exhibits show that in 1876 Willow Point was assessed for taxation with the number of acres as 719. That in 1880 the assessment was reduced to 640 acres, and in 1882 to 563 acres. That in 1886 the assess-

ment was reduced to 375 acres, in 1889 to 259 acres, in 1906 to 150 acres, in 1907 to 50 acres, and in 1912 was assessed as 160 acres, which is the present assessment.

Defendant's Exhibit "J" is a certified copy of a deed from Mrs. Annie E. Newman to Walter A. Newman dated the 26th day of October, 1882, being a deed conveying a portion of Willow Point plantation. This deed contains the following provision:

> "It being well understood by vendor and vendee that by reason of the caving of the banks of the river, the said Willow Point plantation, according to recent surveys has been reduced in quantity to 600 acres."

Defendant's Exhibits "K" and "M" are tax deeds executed by the sheriff and tax collector of East Carroll Parish, Louisiana, selling a part of Willow Point plantation for the non-payment of taxes for the years 1893 and 1907.

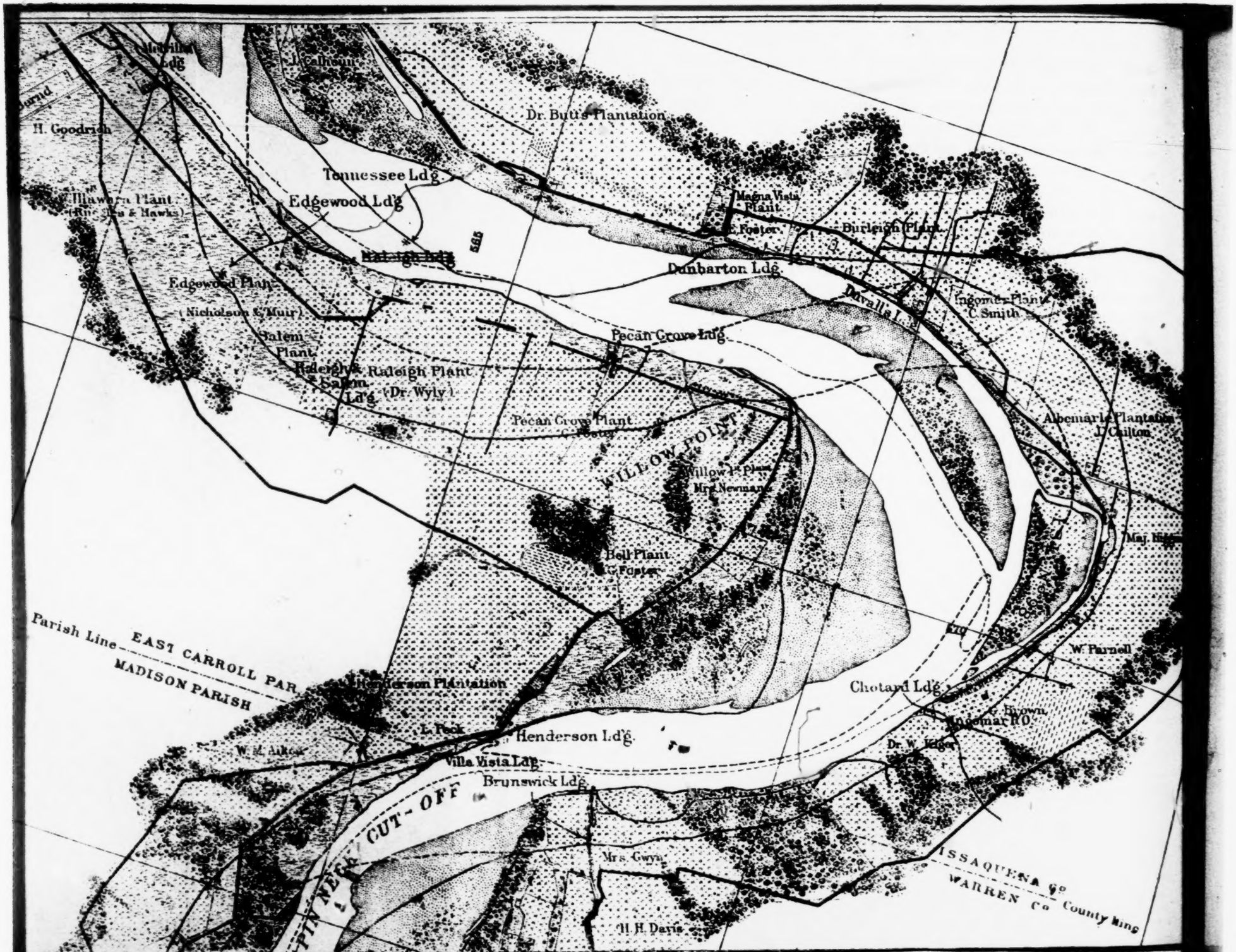
Defendant's Exhibit "L" is a certified copy of a deed from J. S. Milliken to J. A. Craig conveying part of Willow Point plantation.

Defendant's Exhibit "N" is a certified copy of power of attorney and deed from George R. Newman, et al, to Rufus H. and Andrew B. Learned, conveying a part of Willow Point plantation.

These deeds were introduced in evidence for the purpose of showing that neither the State of Louisiana, nor the owners of Willow Point, at any time until the filing of this suit, claimed any part of the lands which are here in controversy.

Exhibits 1 and 2 (R. p. 170-171) are United States Land Office township maps with Mississippi river banks in Louisiana, (1824) and in Mississippi (1823) sketched.

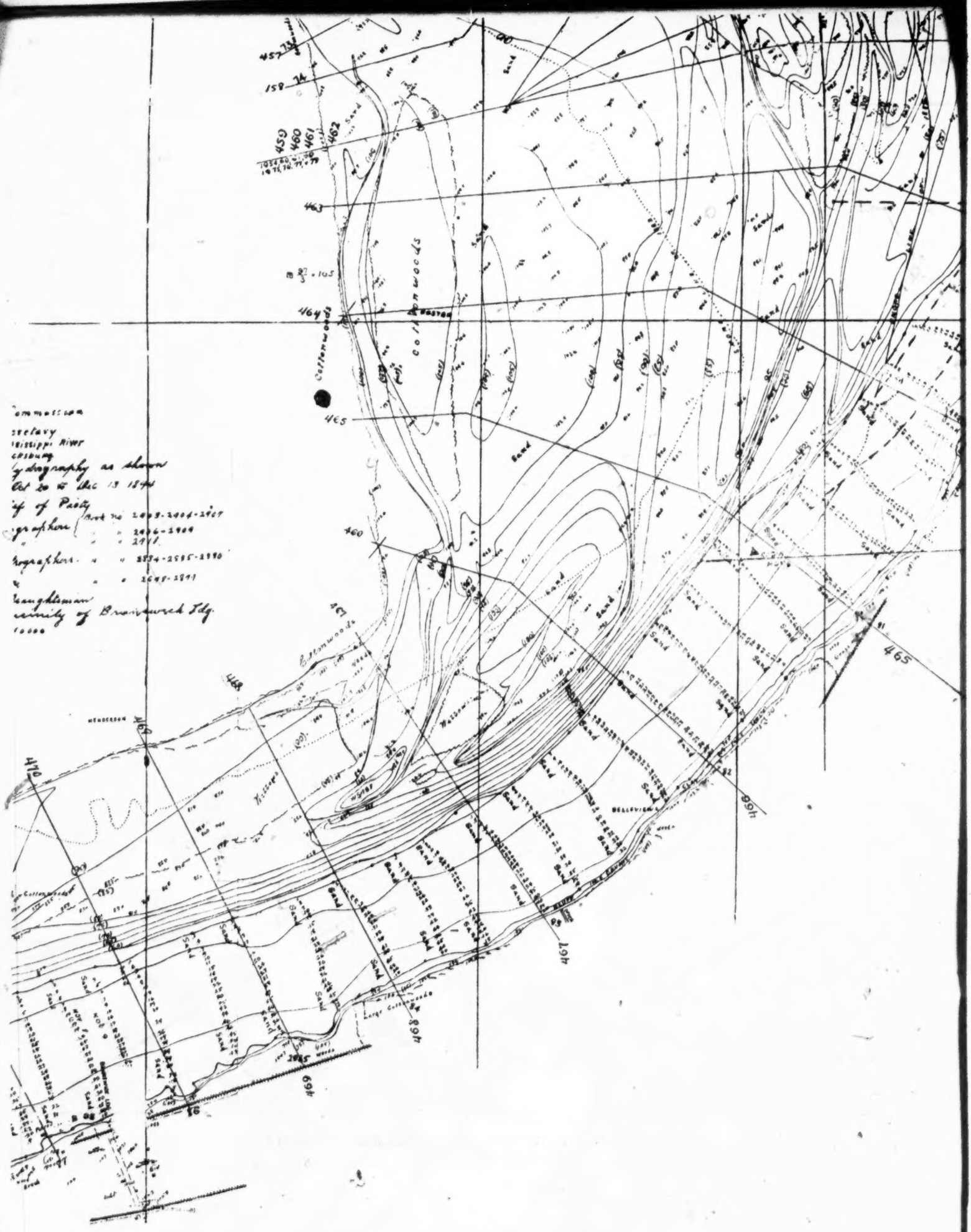
Exhibit 3 (R. p. 171), Complainant's Exhibit "C," Mississippi River Commission Sheet 17, merely is a small scale 1 inch equal one mile, map for non-technical use, made by reduction from the Charts 45 and 46, Survey 1882, scale 1:20000, which are a little more than three times larger than the small scale sheet. Sheet 17 shows the general outline of the river from mile 562 to 595; that is the shore line of main banks and the bars. Also the general features of the land such as the names of owners, timbered or cultivated; location of levees, property lines, parish lines, landings, names of river bends and large lakes, but no details, Government Sights, reference points, contours, elevations or soundings. Willow Point is shown in Louisiana about mile 567 and Chotard Landing in Mississippi about mile 571, with Tullos Island divided into two parts, the lower marked Island No. 98, lying on the Mississippi side between the Point and the Landing. Lack of exactness in detail is evidenced by the difference in the bar line opposite Chotard, as shown on Sheet 17 and on Chart 46, Exhibit 6 C. The indentations of the bar lines shown on the larger scale chart 46, do not appear on Sheet 17, though the small scaled map was made from the larger ones and published in 1883, one year after the large 1882 maps issued.



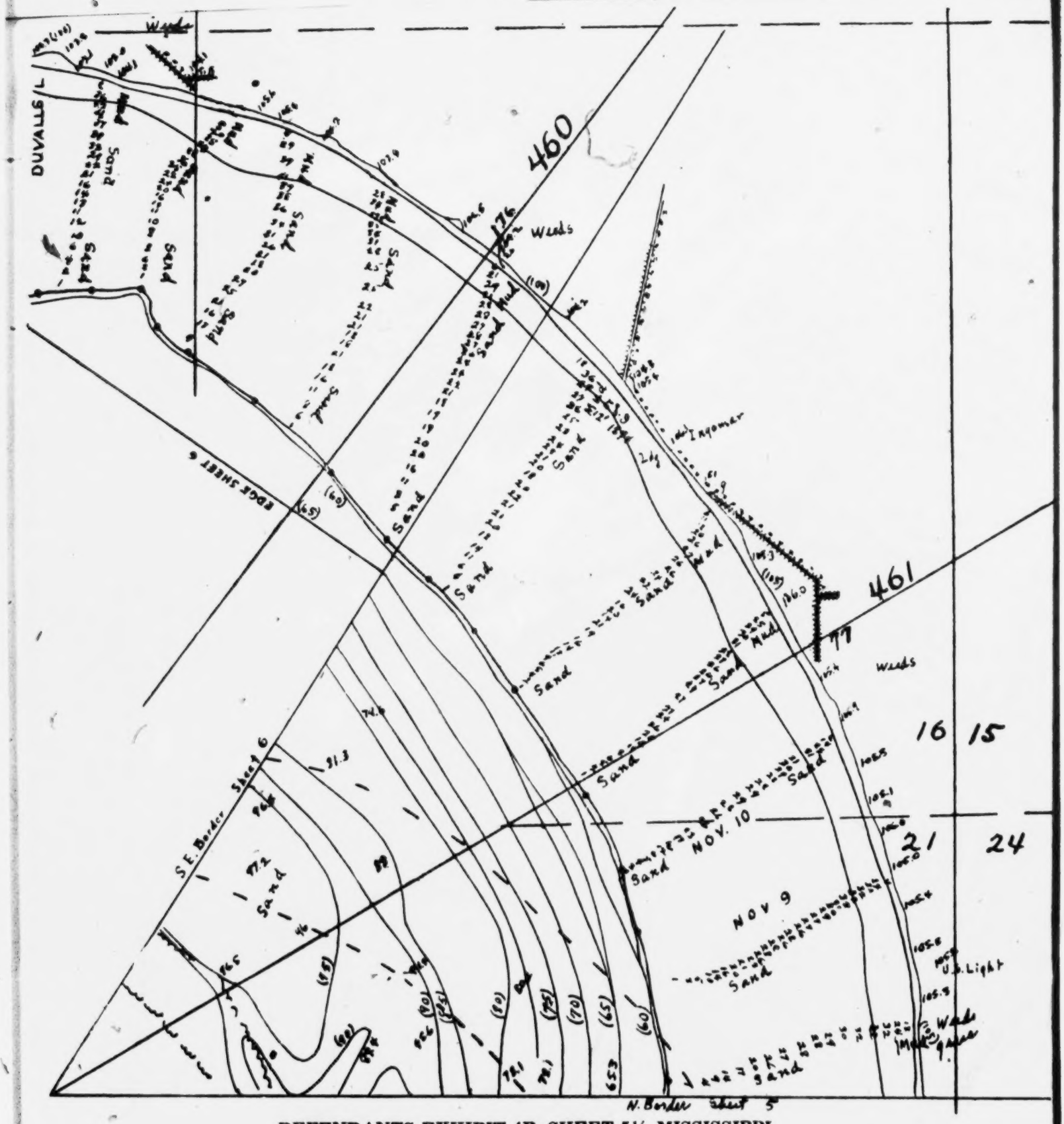
COMPLAINANT'S EXHIBIT "C" SHEET 17 OF MISSISSIPPI RIVER COMMISSION SURVEY OF 1882. EDITION OF 1900.

Exhibit 4-A-B-C (R. p. 171-176) are three blue prints of Field Sheets (5, 5½, 6) of Mississippi River Commission Survey of 1894, scale 1:10,000, certified by the Secretary of War as correct and official maps. They are sun prints from the original maps, projected, (platted from the record notes) by survey in the vicinity of Tullos Island, with the shore line of 1882 indicated by solid and dotted lines where written on the sheets. These shore lines of 1882 are the only things that concern or have any reference to the 1882 Survey which appear on the Field Sheets—they were merely drawn on the Field Sheets at the same location as they appear on the 1882 Chart or more probably on the 1882 Field Sheets. The map-making procedure in the Mississippi River Commission Office was explained by Capt. C. H. West, member of the Commission, but only since 1910, which may sufficiently account for the happy or unhappy disregard he gave to the distinction between the several names by which the Commission maps are designated. (R. p. 148.) As he said, the large working sheets are first made; that is, they are the original maps. These sheets 4-A-B-C, are the same as the working sheets to which he referred. They show everything that is taken by the survey. They are designated Field Sheets and are NOT PRINTED BUT CAN BE OBTAINED FROM THE SECRETARY OF THE COMMISSION as these exhibits 4-A-B-C were. These sheets show that not only was the shore and bar line included in the survey but all the river and land between the top banks and in some instances beyond the top banks, as levees, roads, etc. Soundings were taken in the river, elevations all over the land, by which contour lines were drawn, a topographical survey was made as shown on the sheets, even names of engineers engaged and date employed being stated in the label on each sheet. The sheets show clearly the old river bed between Willow Point and Tullos Island filled to practically a level; elevations at intervals across from Louisiana side to Island are at upper end, 86-4, 86, 89, 85, 86, 90. The 90 is 20 feet lower than the 110 on top of the Island. (R. p. 170). The 110 on top of the Island is 50 feet higher than the water edge, 60. At the lower end of the Island, a mile lower down in

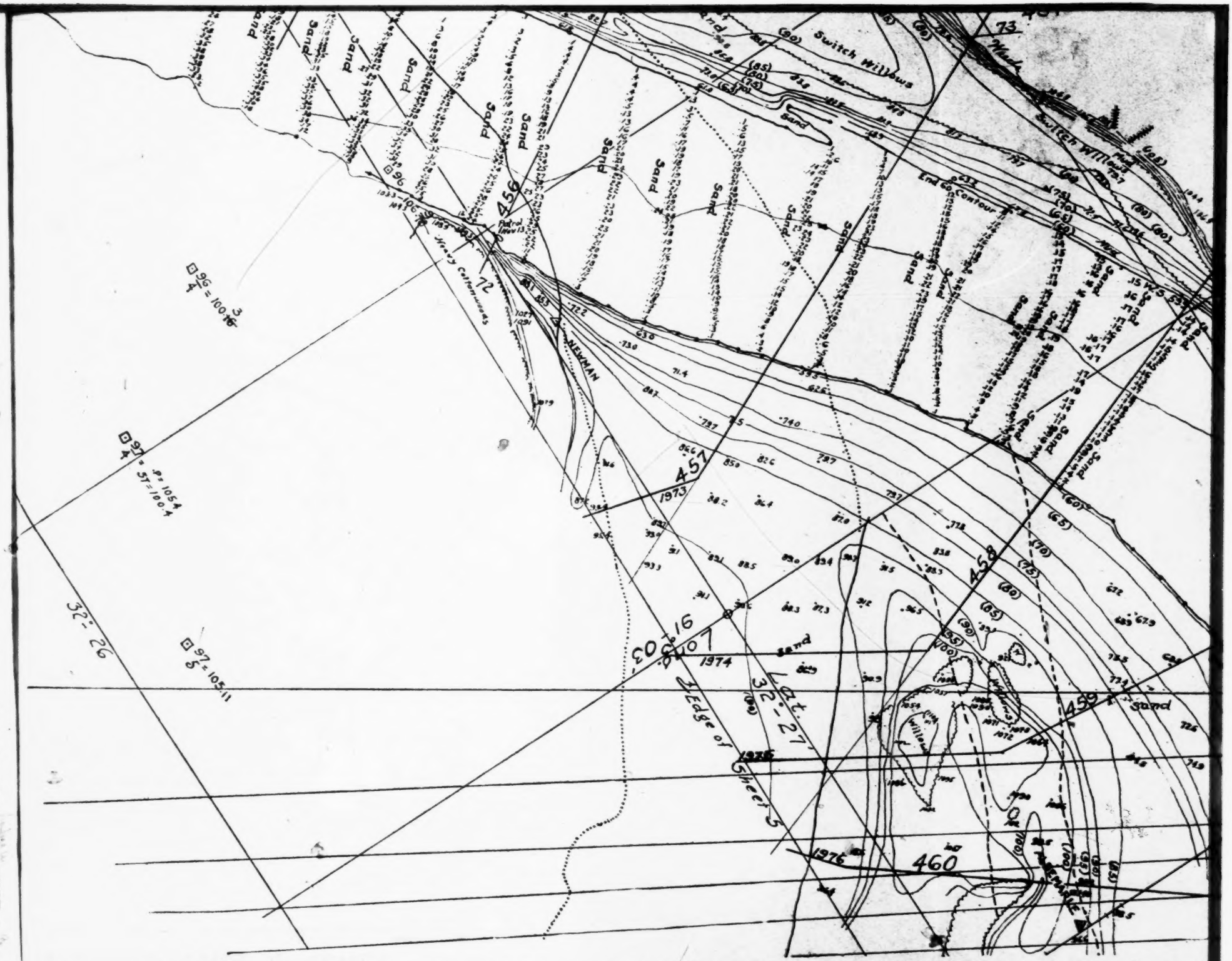
the old bed the elevations run 81, 85, 82, 84 and 89. The elevation on top of the island being higher by 5 to 10 feet in places than it was in 1882, as shown by that survey, while in other localities the elevation halfway down the Island is 100, the same as it was in 1882. Width of the old bed and the location is practically, within a hundred feet or so, the same as the channel in 1882. The lines of latitude and longitude (the lines on the blue print are faint, as are the figures, but are discernible) 32°37′ and 91° .03′, intersect near the middle of the old bed as in the river in 1882. The shore line and bar lines of 1882 appearing on these blue prints were merely drawn on—transferred from the 1882 survey Field Sheets to show where the river bed was at that date and are utterly without significance except to show very slight wearing away on the Island side and accretion on the Louisiana bar side between 1882 and 1894—which was all the change due to caving between Willow Point and Tullos Island.



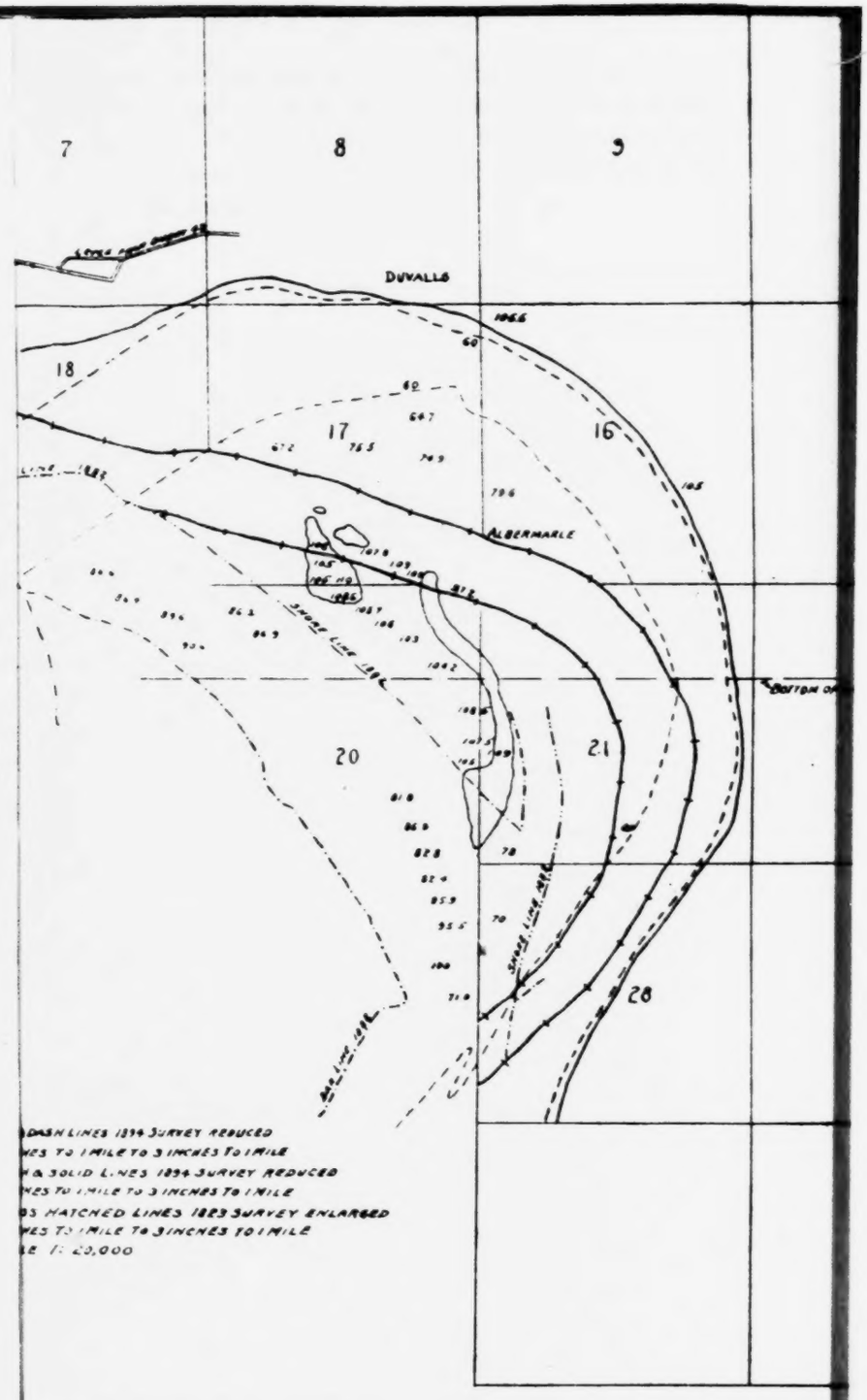
DEFENDANTS EXHIBIT 4A, SHEET NO. 5, MISSISSIPPI RIVER SURVEY OF 1894.



DEFENDANTS EXHIBIT 4B, SHEET 5½ MISSISSIPPI RIVER COMMISSION SURVEY OF 1894.



DEFENDANTS EXHIBIT 4C, SHEET NO. 6. MISSIS SIPPI RIVER COMMISSION SURVEY OF 1894.



DEFENDANTS EXHIBIT 4D, TRACING REDUCED FROM EXHIBITS 4ABC.

These blue print field sheets of the 1894 survey are correlated and joined on one sheet by Capt. Marshall's tracings, Exhibits 4D and 4E. Exhibit 4D is drawn on the same scale as the original field sheets, while Exhibit 4E is reduced to half the size.

Exhibit 4E (R. p. 176), which is changed only in size of scale to coincide with the scale of the Mississippi River Commission Charts, shows the Mississippi River was east of the Island in 1894, with the Island there in the 1882 position. A part only washed away where river went around the upper end and at lower end along the old bank of the chute between the Island and the main Mississippi shore. The north part of lower Tullos Island in Sec. 21, which was cultivated in 1882 and upper Tullos Island in Sec. 20, had extended by accretion northeasterly as the river widened by caving the main Mississippi shore. The lower end of Section 21, on which timber grew, had caved away as the chute widened out to a narrow river width, thereby washing away the lower end of Tullos Island with only slight cutting on the main Mississippi shore in that locality.

Complainant's Exhibit "C" being Mississippi River Commission Sheet 17, of 1882 Survey, with 1894 shore and bar lines printed in red thereon, is not incompatible with the survey as shown on Field Sheets Exhibit 4-A-B-C. In fact, without alteration, Sheet 17 shows exactly the same parts of Tullos Island west of the west shore line of the Mississippi River as shown on Exhibit 4-A-B-C. This is of course true since the red lines printed on Sheet 17 were taken from the Field Sheets 4 A-B-C of the 1894 Survey. Also since the latter sheets show the Island in the same position as in 1882, no change could have been made in Sheet 17 in that regard. In addition, the note printed on Sheet 17 reads:

> "The surveys of 1882 are shown in black.
>
> "The shore line surveys of 1894 are shown by the light lines in red, full lines representing banks and broken lines representing bars."

This is conclusive that as to the 1894 *survey* nothing is *shown* on Sheet 17 except the bank and bar lines in red, but that does not state nor imply that *everything* of the 1894 survey is shown, for Field Sheets 5, 5½ and 6, Exhibit 4 A-B-C clearly show what of the 1894 Survey was left off of Sheet 17. None of the topography taken in 1894 and shown

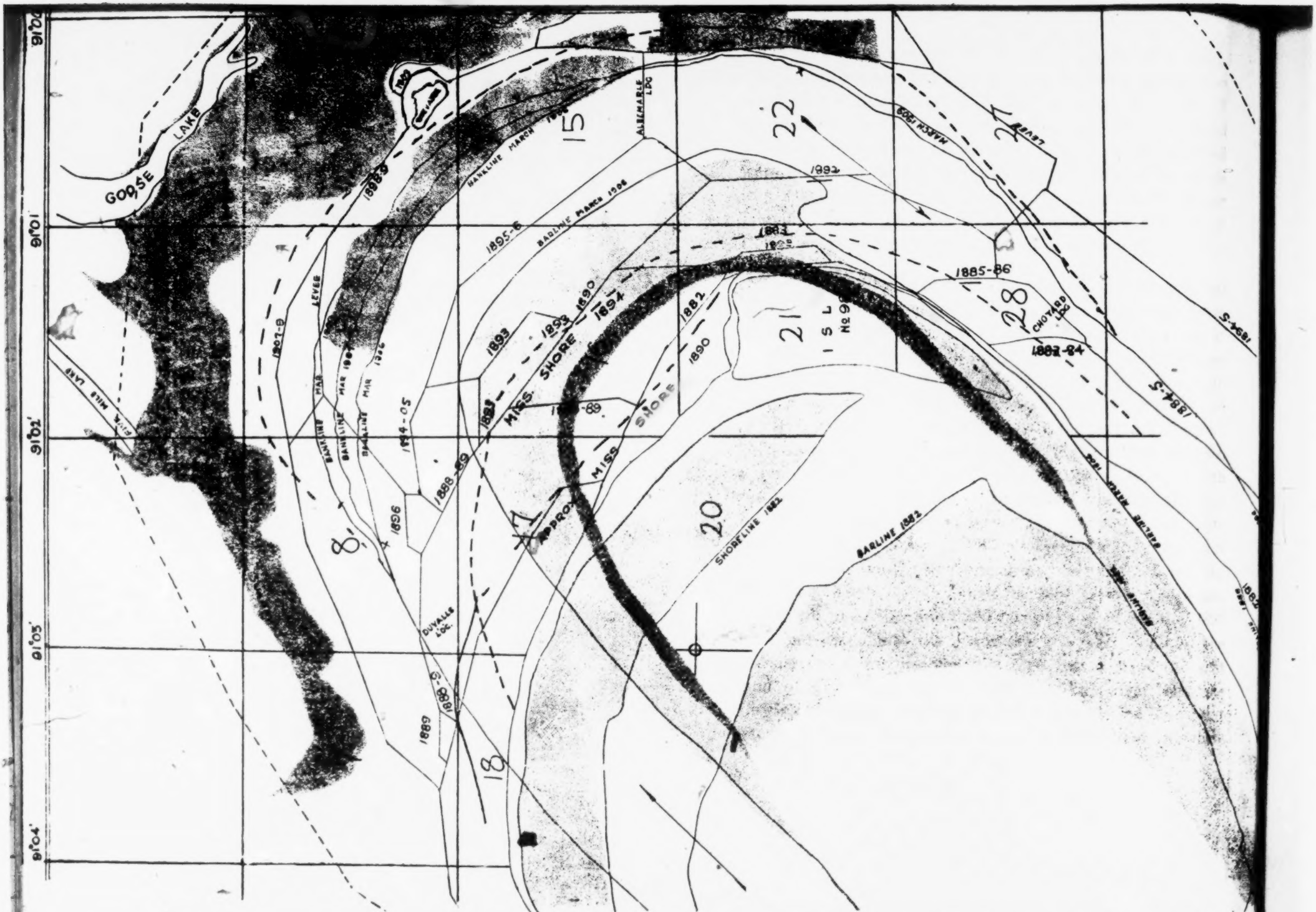
on Field Sheets 5, 5½, and 6 is shown on Sheet 17; no elevations, no contours, no soundings.

Exhibit 5 (R. p. 179-80) Blue print of Mississippi River District Map of Albemarle Bend, L. B. 567-752, April 5, 1906, with the name of C. H. West, Chief Engineer, scale of 1:20000, shows the river, the banks and two islands the same as shown on Mississippi River Commision Charts 45 and 46 of 1882 Survey. In addition, it shows the location of the levees, with the date of building between 1882 and 1906, due to caving banks in Albemarle Bend. Between 1882 and 1885, levees were built first near the head of lower Tullos Island and later near the foot of that Island at Chotard opposite the point of greatest extension of the Louisiana bar in front of Section 7. This shows caving along the chute from near the head of the Island down and it also shows the main Mississippi bank was caving at the foot of the Island and indicates that the lower end of Lower Tullos Island in Section 21 washed away.

This blue print shows the caving stopped near Chotard for several years after 1885 and by 1888 had begun above and behind, east of upper Tullos Island in the vicinity of Duvall's Landing in Sections 7, 8, 16, 17, 18 on the main Mississippi shore, where a levee was built in 1888-89, 13,500 feet or 2¼ miles in length, down to Albemarle Landing. A small run-around, built in 1889, extending to the upper end of the 1888-89 levee, up stream shows caving moved up the river further than expected, but no more levee was built above that.

Testimony of Capt. H. M. Marshall states (R. p. 175), "The mail boat landed at Albemarle Landing against the levee during high water of 1890," showing the width of the chute from the levee over to the upper Tullos Island which was there then. (Both upper and lower Tullos Island were there and the blue print shows the width of the chute was 2,000 feet from the levee to the trees on the upper Island. That is half the width of the river from Willow Point across to upper Tullos Island in Section 20.)

The close approach of the widened chute to the lower en of the 1888-9 levee compelled the building, after high wate of 1890, of an extension levee from the rear lower angle o the 1888-9 levee down the chute 3,500 feet to the 1883 leve at the head of lower Tullos Island. This was followed 1892, by building a new levee from the rear lower corner the 1890 levee down over two miles to the levee at Chotar This shows that including 1888-9 and 1892 working season a complete new levee was built around Albemarle Bend wi the levee above Albemarle set back 3,000 feet from the ea bank of the chute and set back 2,000 feet from the chu bank below Albemarle. In 1893 a loop a mile long was bu to cover threatened levee breach at the junction of t 88-9 and 1890 levees. When the 1894 survey was ma nearly all of 1888-9 and 1890 levees covered by the loop had caved into the river, and the main bank of Mississippi shore in 1894 was 6,800 feet east of the bank of Mississippi River in 1882 where the river th flowing along the west side of Tullos Island. The blue p shows the main Mississippi shore in 1906 when this



"DEFENDANTS EXHIBIT 5, MISSISSIPPI LEVEE DISTRICT MAP OF ALBEMARLE BEND SHOWING CHANNEL FROM 1882 TO 1906
C. H. West, Chief Engineer

print tracing was made by Captain West, was 4,000 feet east of the Mississippi shore in 1894. Other levees are shown that were built after 1893 and shore lines also as the river moved east-north-east.

Exhibits 6 A-B-C-D (R .p. 182) are certified copies of Mississippi River Commission printed maps: 6-A is Sheet 17, scale 1 inch equal 1 mile of 1882 survey, published in 1883, which is the same as complainant's Exhibit "C" and "D" without the red surcharge lines. 6B and 6C are Charts 45 and 46, scale 1:20000, 1882 Survey. 6D is Chart 47, scale 1:20000, 1913-15 Survey.

Exhibit 6 A, Sheet 17, as heretofore stated, really amounts to merely an accurate sketch to be used as reference map by steamboat men, travelers and others, having only superficial interest in the river.

Exhibits 6 B, 6 C and 6 D, are Charts, giving exact data of location, Government Sights, elevations, reference bench marks, depths of the river and information as to surface topography, timber and other growths, with houses, roads and levee improvements shown.

On these charts, red keel lines were drawn, showing the United States land sections as they appear on the township maps in so far as the sections had not caved into the river. The position of the section line was fixed or identified by the points at which they cross the levee.

Exhibit 6 E is a letter from the Assistant Engineer of the Mississippi Levee District fixing the section line crossings on the levee by Station Numbers which appear on the Mississippi Levee District Map, a duplicate of Chart 47.

Captain West located the section lines on the maps (R. p. 135) he made from the county and parish division lines shown on the Mississippi River Commission Charts, measuring from there up the lengths of the sections according to the township plats. The discrepancy arising from the inaccuracy of the township surveys measured by chains and the Mississippi River Commission's exact measurements by triangulation in going the few miles north to the sections involved in this case is not material and the maps

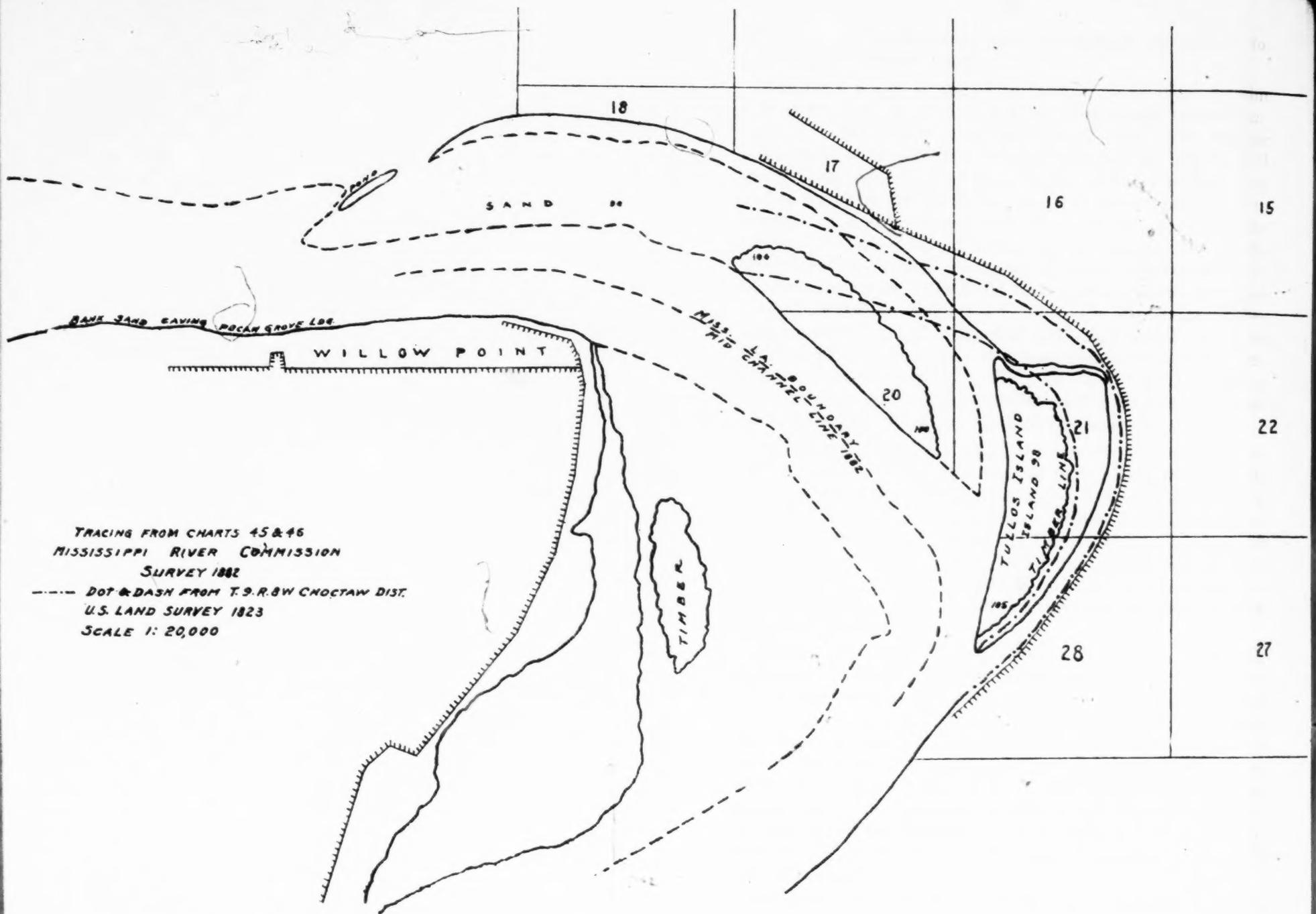
offered by Complainants and Defendants agree—fit to gether, as to section lines.

Exhibit 6 F (R. p. 182) is a tracing made from Exhibi 6 B and 6 C, Charts 45 and 46, of Mississippi River Com mission 1:20000 Survey of 1882 (R. p. 183). The tracin is identical with that part of Charts 45 and 46, Exhibit 6 and 6 C, as to location of river banks, red keel section line and features shown on the tracing. It was made simply t combine on a single sheet what is on the two charts in th vicinity of Tullos Island and to permit comparison of t river location in 1882 as shown on those Charts with th location shown on 1894 Field Sheets, reduced to the sam scale, 1:20,000 on Exhibit 4 E and with Mississippi Rive Commission Chart 47, Survey of 1913-15, Exhibit 6 A. Als Exhibit 6 F and Exhibit 4 E permit comparison with Co plainant's Exhibits "G," "H," "I," and "J" by placi the tracings on top of the Complainant's maps of the sam scale, with corresponding sections one over the other.

Exhibits 6 B, 6 C, 6 E show the condition of the river i 1882 as set out in the statement of facts above which need no repetition here. It may be added, however, the Missi sippi-Louisiana boundary between Willow Point and Tulle Island in 1882 is marked on the Charts 45 and 46, Exhibi 6-B, 6-C, and on the tracing 6-F; the intersection of lati tude 32° 27′ and longitude 91°.03′ printed on Chart 45, Ex hibit 6-B, being in the middle of the river between Willo Point and Tullos Island.

Exhibit 6-D is Mississippi River Commission Chart 4 Survey of 1913-15. It shows the condition of the river aft it had returned to the 1882 channel, which was the fill up bed shown in Exhibit 4 A-B-C of 1894. Willow Poin and the upper end of Tullos Island in Section 20 had cave off at the time of the 1913-15 Survey, whether before o after the return of the river to the 1882 channel is no known and is not material to this case. The downstrean movement left the intersection of latitude 32° 27′ and long tude 91° .03′, in the river at the point of division of the 188 and 1894 channels.

Exhibits 7-A, 7-B (R. p. 183-184) and Exhibits 3 and



DEFENDANTS EXHIBIT 6F, TRACING FROM CHARTS 45 AND 46, MISSISSIPPI RIVER COMMISSION SURVEY OF 1882 AND U. S. LAND SURVEY OF 1823.

blue prints and tracings from which they were made, offered as Exhibits "J" and "H" by Complainant were brought in by Defendant to make it clear that all the maps offered in the case coincide, except Complainant's Exhibit "I" made from Sheet 17, with 1894 bank and bar lines in red, which does not agree with Defendant's Exhibit 4 A-B-C Field Sheets 5, 5½, 6, of the Survey made by the Mississippi River Commission in 1894, nor the tracings Exhibits 4 D-4-E, because Exhibit "I" does not correctly show the conditions of the river and land in the vicinity of Tullos Island in 1894 or at any other time.

ARGUMENT

There is little difference between complainant and defendant in their conceptions of the law of accretion and avulsion. As applied to this case, counsel are agreed on the proposition that where a navigable river is the boundary line between states, and the channel of navigation is changed by nature, or gradual processes know as erosion and accretion, the boundary follows the varying course of the stream, but that where an avulsion occurs in such stream, the resulting change in the channel does not change the boundary, but that it remains in the middle of the old channel as it existed prior to the avulsion.

Nebraska vs. Iowa, 143 U. S., 539, 36 L. ed. 186,
Missouri vs. Nebraska, 196 U. S. 23, 49 L. ed. 372,
Arkansas vs. Tennessee, 246 U. S. 158, 62 L. ed. 638,
Oklahoma vs. Texas, 260 U. S. 606, 67 L. ed. 428.

These propositions will be, therefore, in this brief referred to as settled law. There are other legal propositions, however, which counsel for defendant conceive to be material to the determination of this cause, and these propositions will be discussed in their relation to the testimony in the case, treating such testimony as nearly as possible in chronological order.

I

1823-1882

The burden of proof in this case is upon the complainant.

The fact that there is involved a disputed boundary line between two states does not change the general rule of law in this respect; the same rule being followed as is applicable in the determination of boundary suits between private individuals.

> Rhode Island vs. Massachusetts, 12 Peters, 734, 9 L. ed. 1233.

Nor does the fact that the boundary here in dispute is found in running water vary the general rule in this regard, it being well established that in cases of this character the same rules of law with reference to accretion and avulsion are recognized as in cases between individuals.

> City of New Orleans vs. United States, 10 Peters, 662, 9 L. ed. 573,
> Nebraska vs. Iowa, 143 U. S. 593, 36 L. ed. 186,
> Missouri vs. Nebraska, 196 U. S. 23, 49 L. ed. 372,
> Arkansas vs. Tennessee, 243 U. S. 158, 62 L. ed. 683.

The rule is also settled that there is a presumption in favor of the permanency of boundary lines, and where a party asserts material changes in the course of a boundary river such as will affect the boundary line, the burden is upon him to prove such changes.

> State of Tennessee vs. Muncie Pulp Company, 119 Tenn. 47, 104 S. W. 437,
>
> Oklahoma vs. Texas, 260 U. S. 606, 67 L. ed. 428.

Counsel for complainant in their brief apparently admit the foregoing to be a correct statement of the law, their brief at page 120 containing the following:

> "While the burden of proof to show the changes in the original boundary is on the one alleging the change complainant has fully discharged such burden."

It is elementary law that before riparian rights can attach to land, the land itself must be contiguous to the water, actual contact therewith being necessary.

> Farnham on Water and Water Courses, Vol. 1, p. 304,
> Kinney on Irrigation and Water Rights, Vol. 1, pp. 760 and 761,

Saulet vs. Shepherd, 4 Wallace 502, 18 L. ed. 446,

Posey vs. James, 75 Tenn. (7 Lea) 98,

Fulton vs. Frandoley, 63 Tex. 330,

Nugent vs. Mallory, 145 Ky. 824, 141 S. W. 850,

Wilson vs. Watson, 144 Ky. 352, 138 S. W. 283, Ann. Cas. 1913-A, 774.

Where a party claims lands as accretions, the burden, therefore, is not only upon him to establish the fact that the lands were, in fact, formed by accretion, but he also has the burden of proving that such accretions attached to lands which belonged to him and were contiguous to the water.

Green vs. Witten, 200 Ky. 725, 255 S. W. 519,

Tillotson vs. Fulp, 172 N. C. 499, 90 S. E. 500,

Mann vs. Archbell, 186 N. C. 72, 118 S. E. 911,

Ball vs. McDuffy, (Tex. Civ. App. May, 1919) 212 S. W. 844,

Producers Oil Company vs. State, (Tex. Civ. App. May, 1919) 213 S. W. 349,

Land vs. Dunn, (Tex. Civ. App. Nov. 1920), 226 S. W. 801,

Lennox vs. Isbell (Tex. Civ. App. Dec. 1922), 245 S. W. 728,

Petty vs. Oil Company, (Tex. Civ. App. Oct., 1923), 254 S. W. 565.

From the foregoing authorities, it is evident that before the State of Louisiana could establish its case it is not only necessary that it overcome the presumption that boundary lines once established are permanent, but it also must meet the burden of proof and establish by a preponderance of the evidence, the following facts:

1. That accretions were added to territory on the westward side of the Mississippi River.

2. That these accretions were added to Louisiana territory, or, in other words, that Louisiana territory at the time the accretions were formed, was contiguous to the water.

The defendant, State of Mississippi, contends that the

complainant has failed to meet the burden imposed upon it in each of the two foregoing particulars. As has been stated in the foregoing pages of this brief, testimony of complainant's witness, Charles H. West, shows that between the years 1824, when the first survey of the Louisiana territory at the point in question was made, and the making of the map of the Mississippi River Commission in 1882, the river had moved its channel eastward about a mile and one half. The presumption being that boundary lines once established are permanent, it was incumbent upon the State of Louisiana to prove by a preponderance of the evidence that this change in the channel of the river between these years was the result of accretion rather than of avulsion If the change was the result of accretion, then the boundary followed the river, while if the change was caused by avulsion, the boundary remained fixed as it was prior thereto. In order to meet the burden imposed upon it in this respect and to prove that the river moved its channel gradually and to the eastward from its 1824 to its 1882 location by accretion, the complainant introduced only one witness, Charles H. West. The testimony of this witness is discussed in the preceding pages of the brief, and for that reason will only be touched lightly at this point. The witness does not testify from personal knowledge, but only from the maps introduced in evidence as exhibits to his testimony, they being the 1824 governmental township plat of the Louisiana territory at the point in question; (Complainant's Exhibit A); a blue print prepared by himself purporting to show the Louisiana shore line in 1866 (Complainant's Exhibit "G"); a map of Hopkins Island, an island in the river in the vicinity of the territory in question (Complainant's exhibit "BB"); and Mississippi River Commission Chart Number 45, Survey of 1882 (Complainant's Exhibit "M"). The purported map of 1866, R. p. 147, was not introduced in evidence, and the blue print based on such was not admissible in evidence, because not founded upon any facts disclosed by the record, and being in effect hearsay evidence. The 1870 map of Hopkins Island, R. p. 148, did not purport to be a map of the shore line of the river but only of the island itself. With these

maps furnishing the basis of his opinion, the witness testified that the Mississippi River gradually moved to the eastward by erosion of the Mississippi shore, and the Louisiana shore line progressively followed it, building by accretion, until it reached its 1882 channel.

This is the only testimony which is offered by the complainant to overcome the presumption that the 1824 boundary line was permanent and to meet the burden imposed upon it of showing how the river moved from its 1824 to its 1882 channel. The weakness of this testimony is evident when it is considered that all of this witness's testimony was opinion evidence, highly speculative and based upon facts of no evidentiary value. Especially does it seem weak and unconvincing when the testimony of other witnesses, both for complainant and defendant, describes the physical conditions and surroundings in this area between the location of the 1823 channel and the 1882 channel.

Complainant's witnesses, George Prince, R. p. 39, George Newman, R. p. 55, 56, 58, 59 and 60, and defendant's witnesses, Lawrence Towns, R. p. 232, 233, and Etna J. Albrittian, R. p. 245, 248 and 251, all testify that they are familiar with a depression in this area on the Louisiana mainland running in the approximate location of the river channel of 1823. This depression is known locally as "St. Francis Chute", and the defendant's witnesses testify that it is known as the old river channel of 1823. The defendant's witness, Albrittian, with a surveyor located this old channel showing it to be in practically the same location as the river channel in 1823. His testimony shows that the bank line of the old channel was clearly discernable on each side for a great part of the way along the chute, R. p. 245, 248, 251, and that in times of high water it was filled from its northern to its southern limits. Chart 45 of the 1882 Survey and Chart 47 of the 1913-1915 Survey both clearly show this old river channel although not designated thereon by name.

The fact that this old river channel is clearly discernable is positive proof of the fact that the river had not changed its location from its 1823 to its 1882 channel by accretion.

It is common knowledge that if this change had been by accretion, both banks of the old channel could not remain, because as the accretion would gradually build to the shore and as the river would gradually move to the eastward, the east bank of the river would necessarily be worn away and destroyed. Where both banks of the old river are shown to still be in existence as is the case here, then there is no conclusion to be reached other than that the river suddenly and violently changed its course so as to leave the old river bed dry and the banks on each side still standing.

The case of Simpson vs. Martin, 174 Ark., 956, 298 S. W. 861, on its facts is practically identical with the case at bar. In that case the court said:

> "It is the contention of the appellant Simpson that the south bank of the river gradually caved and washed away until the bend of the river had entirely disappeared, and that, as this was done, the north bank gradually moved southward by the accretions to that shore, and that the original lands to which appellees had a record title gradually disappeared and became a part of the channel of the river, until finally the accretions to appellant's lands occupied the area which once comprised the land of appellees, together with other lands contiguous thereto and south thereof, all of which appellant Simpson claims as an accretion to his land."
>
> * * * * *
>
> Appellees deny that these lands were an accretion to appellant's land. On the contrary, they assert their land never disappeared through the action of the river, but has remained as original land at all times since the Government survey, which was made in 1826, and, in addition, they say they have title to certain lands also involved in this litigation as an accretion to their own land. They also say that at some time subsequent to 1826, the river changed its course as the result of an avulsion or cut-off, and the court below sustained this contention, and entered a decree accordingly, and, upon this finding of fact, apportioned to appellees and certain other riparian owners the accretions to lands which are south of the river according to the survey

of 1826. The apportionment of this accretion was one of the subjects involved in the cases consolidated with the cases here appealed, but, as the parties to those suits have not appealed, we need not consider this feature of the case.

The appeal of the appellant Simpson does raise the question of the correctness of the court's finding of fact, but the appeal presents no other question than this question of fact, except only the question of law as to the burden of proof concerning the manner in which the river changed its course.

The question for decision may therefore be stated as follows: Did the river leave the bend shown by the survey of 1826 by the process of accretion, or by an avulsion or cut-off?

In a case presenting many issues of fact similar to the present case, the Supreme Court of Tennessee, in the case of State vs. Muncie Pulp Co., 119 Tenn. 47, 104 S. W. 437, held (to quote a syllabus), that 'the presumption is in favor of the permanency of boundary lines, and the burden of proof is on the one averring that the location of the line has been changed by the action of the forces of nature.' See also 9 C. J. 271, and Bissell V. Fletcher, 27 Neb. 582, 43 N. W. 350.

Inasmuch as appellees are in possession of land shown to be land by the original Government survey, the patents from the United States to the State of Arkansas, and from the State to appellees' predecessors in title, we think the burden was upon appellant to show that the land described as such disappeared and later formed as an accretion to his own land, and this would be true whether he was the plaintiff or the defendant in an action in which that question arose."

In the case of Baumhart vs. McClure, 21 Ohio, App. 491, 153 N. E. 211, title to a certain lot bordering on Lake Erie was involved. This lot was surveyed in 1837 and appeared on the tax rolls from 1837 to 1853, from which time until shortly before the filing of the suit, it was under the waters of the lake. When the lot reappeared, the holder of the

title entered upon the same claiming it as his own. The owner of the lot abutting thereto brought suit, claiming that this lot as restored was added to his lot by accretion, and, therefore, is his own. There was no proof in the record showing whether this lot was washed away gradually by erosion or whether it suddenly disappeared as the result of an avulsion. The court in holding that the plaintiff must fail because he had not met the burden of showing how the disappearance of the lot occurred, had the following to say:

> "In view of the fact that the defendant has a connected chain of title to lot 434 by deed of conveyance, the burden of proof rests on the plaintiff to show such a state of facts as would deprive the defendant of that title. As a riparian owner may gain land by accretion or reliction, so he may likewise lose land by the slow process of erosion, and, if the land owned by the defendant, and her predecessors in title, was taken from them by the slow process of erosion, it would ordinarily be forever gone. This, however, would not be the case if lot 434 was washed away by a storm or storms resulting in a sudden avulsion."

The case of Oklahoma vs. Texas, 260 U. S. 606, 67 L. ed. 428, was a suit by Oklahoma against Texas to establish a portion of the boundary line between the two along the Red river. The boundary between these two states is a part of an old one between the territories of the United States and the Spanish Possessions to the southwest, which was defined in the Treaty of 1819 and ratified in 1821. The court construed this boundary to be on the south bank of the Red river as it existed in 1821, subject to application of the doctrines of erosion and accretion and of avulsion to any intervening changes. The State of Oklahoma contended that the channel in 1821 was different from the channel as it exists today, and that it is entitled to territory which is now south of the present banks of the river. There were no maps, surveys or records made of the river showing the situation existing in 1821, nor were there human witnesses to testify relative to the situation at that time. In passing on the question of whether there had been a

change in the channel of the river, by avulsion as contended by Oklahoma, the court said:

> "Common experience suggests that there probably have been changes in this stretch of the Red river since 1821, but they cannot be merely conjectured. The party asserting material changes should carry the burden of proving them, whether they be recent or old. Some changes are shown here and conceded. Others are asserted on one side and denied on the other."

Under the authority of the foregoing cases, the State of Mississippi earnestly contends that the State of Louisiana has failed to prove by a preponderance of the evidence that the Mississippi river changed from its 1823 to its 1882 channel as a result of accretion.

Not only is this proof insufficient to overcome the presumption of the permanency of boundary lines and to prove by a preponderance of the evidence that the boundary shifted as alleged by the complainant, but the proof offered by the defendant with reference to the physical facts and circumstances is so strong and it so thoroughly refutes and contradicts the opinion evidence of the only witness for the complainant as to show practically beyond dispute that this change was a result of avulsion.

If this be true, then the entire case of the State of Louisiana must fail because its base has not been established; there being no proof that accretions ever attached to land which in fact belonged to the State of Louisiana. In other words, the State of Louisiana even though it showed that accretions attached to the western shore subsequent to the year 1882, yet has failed to prove that they attached to land belonging to Louisiana and contiguous to the river.

II.

1882-1913

All of the testimony offered by complainant with reference to accretions attaching to the west shore of the river, is given regarding conditions existing subsequent to the year 1882. The contention of complainant and its entire case in this regard is based on the assumption that Tullos

Island completely washed away, and that the Mississippi river moved eastward over the site of the island; adding by accretion to Willow Point in the State of Louisiana; that later the river made a cut-off across the accretion leaving a new island—Newman Towhead, in Louisiana. If the complainant has established these facts, then under the rule laid down by this court in the cases of Iowa vs. Nebraska and Arkansas vs. Tennessee, supra, the territory in question belongs to Louisiana, provided the complainant has first established its contention dicussed in subdivision I of this argument.

The contention of the defendant is that Tullos Island did not wash away, but that the channel around the island changed from the west side to the east side thereof, the old channel filling up until the island became connected to the Louisiana shore; that it then continued to grow by accretions added thereto on its eastward side until the year 1912, when the river returned to its old 1882 channel leaving this territory again an island but greatly enlarged by reason of the accretions added thereto. If these facts be established by the evidence, then Tullos Island, or Newman Towhead, as it is designated on Chart 47 of the Mississippi River Commission Survey of 1913-15, is Mississippi territory; the change in the channel of the river around the island not affecting the boundary line between the states.

Missouri vs. Kentucky, 11 Wallace 395, 20 L. ed. 116,
Indiana vs. Kentucky, 136 U. S. 1, 34 L. ed. 329,
Arkansas vs. Tennessee, 246 U. S. 158, 62 L. ed. 638.

In the case of Missouri vs. Kentucky, supra, the question for determination was the establishment of a part of the boundary line along the Mississippi river between the states of Missouri and Kentucky. The territory in controversy was Wolf Island, which at the time of the filing of the suit, was on the Missouri side of the main channel of the river. The case turned on the proposition of whether or not at the time the territory of Kentucky was formed with her boundary on the west fixed as the middle of the Mississippi River, Wolf Island was on the Missouri side, or on the Kentucky side of the middle of said river. The court laid

down the following rule of law governing the case:

> "It follows, therefore, that if Wolf Island, in 1763, or in 1820, or at any intermediate period between these dates, was east of this line, the jurisdiction of Kentucky rightfully attached to it. If the river has subsequently turned its course, and now runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the States, and the island does not, in consequence of this action of the water change its owner. Heffter, p. 143, sec. 66; Caratheodery Du. Droit Inter., p. 62."

In the case of State of Indiana vs. State of Kentucky, supra, the question involved was the ownership of what is known as Green River Island, which at the time of the filing of the suit was connected to the Indiana shore by an old filled-up channel of the Ohio River. When Kentucky was created as a territory, its northern boundary at the point in question as defined in the act of creation was construed by the court to be the low water mark of the Ohio river on the north side of the channel. At the time of the creation of the territory the channel of the river ran between Green River Island and the Indiana shore. By a subsequent change in the river, however, this old channel was abandoned and became filled up so that the island was attached to the Indiana mainland. Under these facts, the court laid down the following rule as governing the case:

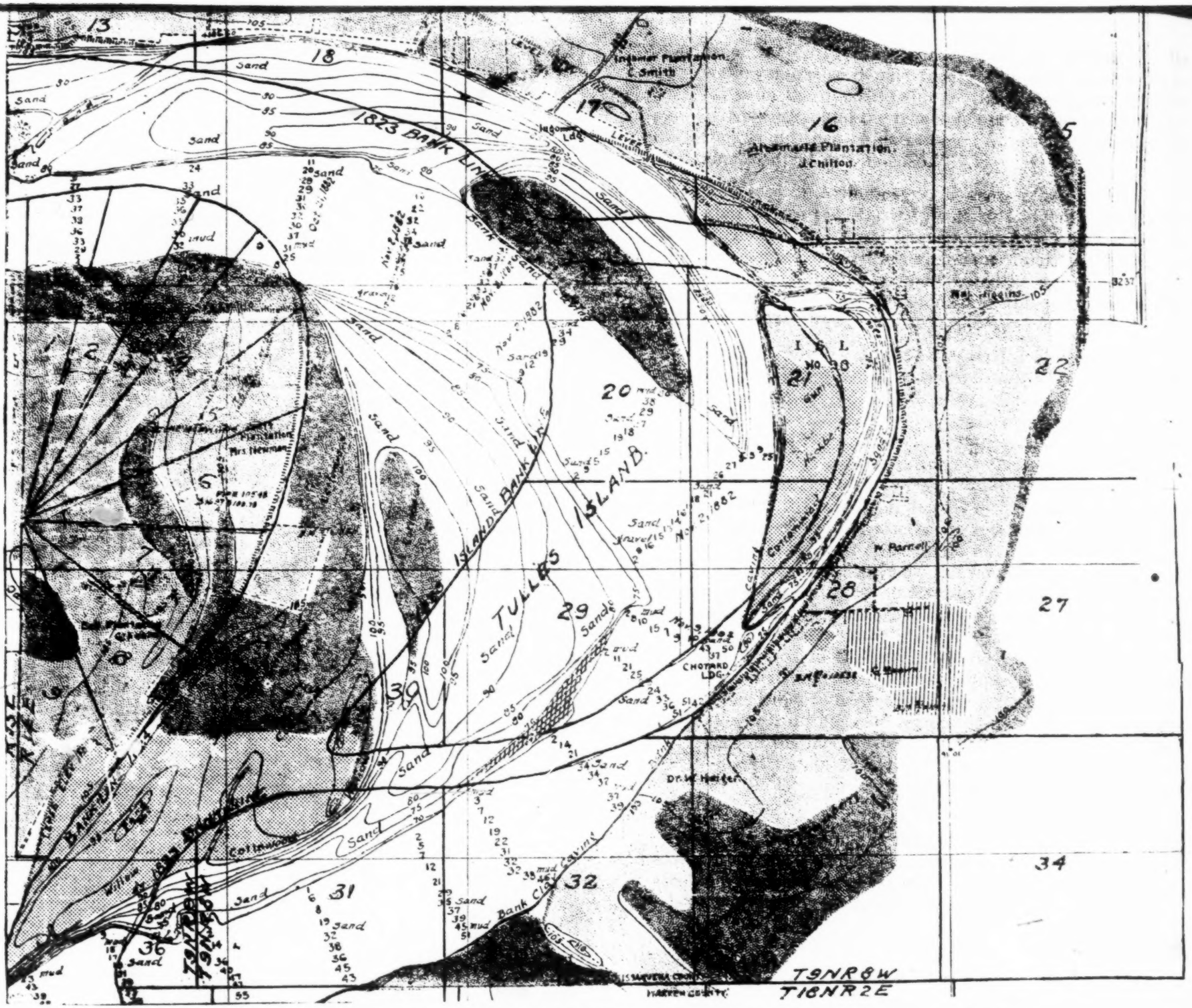
> "If when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to low-water mark on the northwest side of the river. She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the

> tract in controversy to the State of Indiana. waters might so depart from its ancient channel a leave on the opposite side of the river entire countie of Kentucky, and the principle upon which her jurisdi tion would then be determined is precisely that whic must control in this case."

In the case of Arkansas vs. Tennessee, supra, the cou held that where the Mississippi river suddenly abandone its old channel and formed a new one, as a result of whic the old channel filled up and became land, the filling u of this old bed should not be treated as accretion, but a the ultimate effect of avulsion. On this proposition th court had the following to say:

> "Certainly it can not be regarded as having the e fect of carving out an exception to the rule that whe the course of the stream changes through the oper tion of the natural and gradual processes of erosio and accretion, the boundary follows the stream; whi if the stream leaves its former bed and establishes new one as the result of an avulsion, the boundary r mains in the middle of the former channel. An avu sion has this effect whether it results in the drying u of the old channel or not. So long as that channel r mains a running stream, the boundary marked by is still subject to be changed by erosion and accretio but when the water becomes stagnant, the effect these processes is at an end; the boundary then comes fixed in the middle of the channel as we l defined it, and the gradual filling up of the bed ensues is not to be treated as an accretion to the sho but as an ultimate effect of the avulsion. The em gence of the land however, may or may not follow, it ought not in reason to have any controlling eft upon the location of the boundary line in the old ch nel."

From the foregoing, it is evident that the gist of th case, insofar, as conditions existing subsequent to the ye 1882 are concerned, is whether or not Tullos Island Island 98, entirely disappeared.



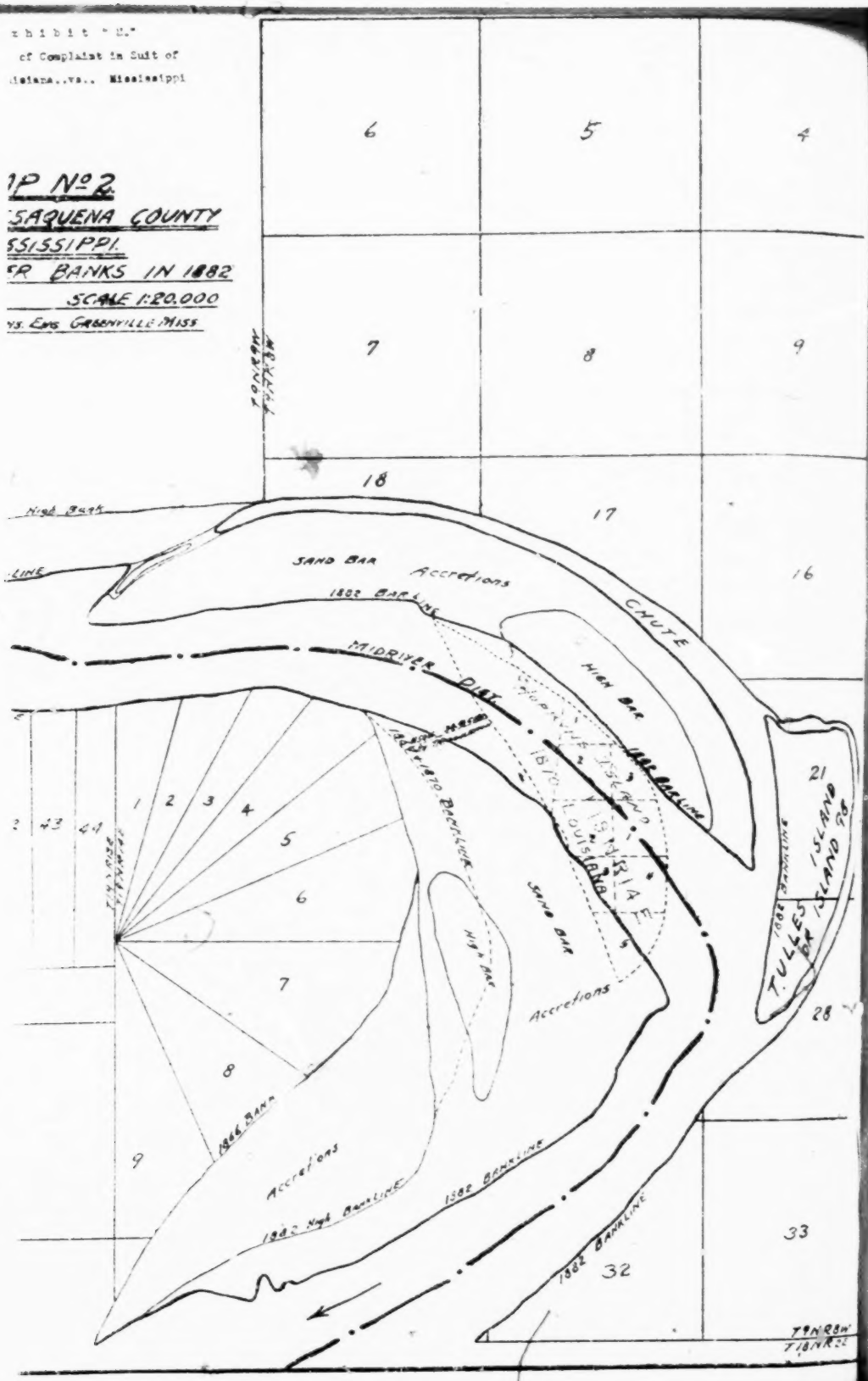
COMPLAINANT'S EXHIBIT "M", CHART 45, MISSISSIPPI RIVER COMMISSION SURVEY OF 1882.

Complainant in their brief at page 89 thereof attempt to show that Island 98, or Tullos Island, did entirely disappear. As proof of this statement, the court is cited to Mississippi River Commision Chart 45, Survey of 1882, (Complainant's Exhibit "M"); sheet 17 of the Mississippi River Commission Survey of 1882, with the shore lines of 1894 drawn thereon in red (Complainant's Exhibit "C"), and the testimony of the witnesses, E. T. Purnell, Captain Joseph V. De La Hunt, Captain Charles H. West, Captain George Prince, Captain W. H. Reed, Ernest Newman, George R. Newman and William Miller. These references made by counsel to the proof in the case will here be discussed in the order presented by them.

Complainant's Exhibit "M" Mississippi River Commission Chart 45, Survey of 1882, shows that Tullos Island, or Island 98, was in existence at that time. This chart also shows another island located to the northwest of Island 98, and not named on the chart. Captain Marshall, in his testimony, refers to these two islands as upper and lower Tullos Islands. R. p. 171, 175. There is no dispute but that both of these islands were Mississippi territory at the time the chart was made in 1882. This is shown most clearly by complainant's exhibit "M" where on Chart 45, complainant's witness West has superimposed the Mississippi 1823 and the Louisiana 1824 governmental surveys. This exhibit shows that the greater part of both upper Tullos Island and lower Tullos Island, or Island 98, as shown on the 1882 chart was a part of original Tullos Island as surveyed in 1823. It is of importance that these facts be kept clearly in mind, because of the confusion which otherwise would come about due to certain witnesses referring to upper Tullos Island by the name of Hopkins Island.

Counsel for complainant first refer to the testimony of E. T. Purnell, R. p. 264, 265, 271, 283 and 286. The gist of this testimony is merely that in 1893, '94 or '95, Island 98, or lower Tullos Island, disappeared. Even though this testimony was undisputed and conceded to be true, yet unless the complainants have also shown that upper Tullos Island washed away, then their case must fail. That this

island did not wash away is conclusively shown by the testimony of this very same witness. He refers to upper Tullos Island by the name of Hopkins Island. In order, however, to clearly determine what the witness meant by "Hopkins Island" counsel for defendant, referred him to complainant's Exhibit "H" which showed the position of Hopkins Island as surveyed by Louisiana in 1869 and 1870, superimposed in dotted lines on blue print of the 1882 survey. (The Hopkins Island surveyed by Louisiana in 1869 had entirely disappeared and was in the bed of the river when the 1882 River Commission Chart was made. See testimony of Charles H. West, R. p. 140). The witness when shown the blue print pointed out upper Tullos Island, marked on the blue print "high bar," as being what he knew as Hopkins Island, R. p. 277.



"COMPLAINANT'S EXHIBIT "H."

The testimony of this witness shows that upper Tullos Island, known to him as "Hopkins Island," never washed away. R. p. 275. This witness also testified that the channel of the river changed about Hopkins Island. R. p. 276.

N. B.: This witness's testimony is very significant and when analyzed goes far towards establishing the theory and proving the case of the defendant. The only point of difference between his testimony and that of witnesses for defendant is that this witness testified that lower Tullos Island completely washed away, while defendant's witnesses show that neither upper nor lower Tullos Island was destroyed. Even taking his testimony as true, it has only been shown that lower Tullos Island washed away, but that the channel of the river changed around upper Tullos Island, which did not wash away. If such be the true facts, then the theory of defendant has been established.

The next witness referred to by counsel in their brief is Joseph V. De La Hunt. R. pp. 292, 293, 294, and 295. The testimony of this witness, as the court will see, more firmly establishes and proves the defendant's theory than did that of the preceding witness.

Captain De La Hunt testified that Island 98, or Lower Tullos Island, completely disappeared. His testimony is equally as positive that upper Tullos Island, or Hopkins Island, or Hopkins Tow Head, as known by him, never disappeared. R. p. 298. His testimony is also to the effect that there was no channel to the west of Hopkins Island, or Hopkins Tow Head.

N. B.: This testimony carries to its logical conclusion that of complainant's witness, Purnell, who stated that the channel changed about Hopkins Island. This witness (De La Hunt) shows that the old channel west of Hopkins Island had filled up. It also bears out and supports the testimony of Captain Marshall to the effect that the channel of the river cut around to the north and east of upper Tullos Island, abandoning its old channel to the west of upper Tullos Island, which filled up so that the island became connected to the Louisiana shore.

The complainant's witnesses, Captain George Prince, R. p.

25, 26, 33 and 34; Captain W. H. Reed, r. p. 110, 120, 121, 122 and 128; Ernest Newman, r. p. 54, 55, 57, 58 and 63, and George R. Newman, r. p. 73 and 74, knew nothing about Island 98, it being undisputed that at the time to which their testimony was directed, i. e., subsequent to 1894, there was not an island in the main channel of the Mississippi river at the point in question; it having been attempted by complainant to show that prior to that time, Island 98 had disappeared, and by the defendant that the channel had gone around the islands to the north and east and they had become connected to the Louisiana shore by the old filled-up river bed. For this reason, their testimony concerning the existence or nonexistence of the island and whether or not it disappeared is worthless except in so far as it related to the physical facts existing on the tow head, or island, at the time of their observation. All of these witnesses are familiar with the depression running between Willow Point and the island at that time. R. pp. 39, 63, 69, 107, 108.

The witness Reed was also familiar with the place on the island, or towhead, where there is a high bank with cottonwoods growing on the top and a new deposit of soil at the bottom of the bank with willows on it. R. pp. 124 and 125.

N. B.: Captain Marshall's testimony shows that the depression referred to by these witnesses was the old filled up 1882 river channel. R. pp. 172, 173, 178; and the defendant's witness, Albritton, shows that the high bank with a new deposit at the bottom referred to by complainant's witness, Reed, was the west bank of the old 1823 island chute. R. p. 38.

Counsel for complainant next refer to the witness William Miller as testifying to the fact that Tullos Island completely disappeared. This witness not only failed to testify that the island disappeared, but he testified positively that it did not disappear, but that it was there in 1916 and was there, "this Sunday. I saw it Monday. I pass it once or twice a week." R. p. 304.

The only other witness referred to by counsel in their

brief as testifying that the island washed away is Captain Charles H. West. This witness was evidently the star witness on whom complainant pinned its hopes and faith, and references are made to his testimony reverently, and the facts testified to by him are referred to as proven, because "ipse dixit."

This witness testifies that Island 98 completely washed away and disappeared, and that Willow Point by accretion built over the location which formerly had been occupied by the island. R. p. 143 and 144. He bases this testimony upon two maps, one Chart No. 45 of the Mississippi River Commission Survey of 1882 (Complainant's Exhibit "M") and Sheet 17 of the Mississippi River Commision, which is a small scale map of the 1882 survey with the shore line of the 1894 survey superimposed thereon in red lines. (Complainant's Exhibit "C"). The gist of this testimony merely is that because the shore line in 1894 was east of the shore line in 1882, it necessarily had moved to its 1894 location as a result of accretion.

This witness was unaware of the fact that the 1894 survey contained the same character of detail and was similar in all respects in its preparation to Chart 45, Mississippi River Commission Survey of 1882. This fact possibly accounts for his using the small scale Sheet 17 rather than the original field or work sheets of the 1894 survey in giving his opinion testimony regarding the change in the channel of the river. It is inconceivable that had the witness had the benefit of the work or field sheets of the 1894 survey showing all details of elevation and contours that he would have fallen into the glaring error that he did.

Counsel for complainant, either by blindly following Captain West's testimony with reference to the non-existence of the detailed survey in 1894, or by failing to examine Defendant's Exhibits, 4-A-B-C or if having examined them by making only a superficial examination of the same, have fallen into the same error as Captain West. Their brief is replete with statements as to the ignorance of Captain Marshall in assuming that there was a detailed topographical survey in 1894. Captain West in his testimony says:

"The survey of 1894 **did not** take in the topography. It only took in the change in the position of the river alone, and that survey was printed on the Charts of the 1882 survey." R. p. 151.

On being asked about the original field or work sheets, the witness West again denies the existence of a detailed survey in 1894 and states that if these sheets were obtained only the shore line would be shown thereon. R. pp. 157, 158.

Counsel in their brief at page 49, in referring to this testimony of the witness West say the following:

"Comment: This shows there was no topographical survey between 1882 and 1913."

On page 58 of the brief counsel in referring to the testimony of Captain Marshall explaining what Exhibits 4-A-B-C, blue prints of the original work sheets of River Commission Survey of 1894 show, said:

"This testimony is without foundation. The survey of the Mississippi River Commision need only be examined to show its fallacy."

Again at page 61 of the brief counsel say:

"The witness was evidently ignorant of what the survey of 1894 showed, and had assumed that the survey of 1894, like the survey of 1882, showed the topography and elevation, when it did nothing of the kind, but showed only the changes in the position of the river alone."

Again at page 66 of the brief counsel say:

"Comment: The error of the witness in this regard has heretofore been explained. He evidently did not know that no new chart was made from the survey of 1894, but that this survey was superimposed on the chart of 1882. (R. p. 149, 151, 152.)

All of the testimony of Mr. Marshall showing topographical elevations, etc., in 1894 is based on the error which arose from his using the chart of the survey of 1882."

On page 67 of the brief, counsel say:

> "Certainly these deductions of Captain Marshall, based on the errors of fact and ignorance of what the survey of 1894 shows can not overthrow the testimony of the eye witnesses to the fact that Island 98 entirely disappeared, especially when such testimony is shown to be true by the survey of the Mississippi River Commission of 1894."

On page 97 of complainant's brief, counsel say:

> "Captain H. M. Marshall was evidently partly in error in assuming that the chart of the survey of the Mississippi River Commission in 1894 showed the topography and elevations of said year, when as a fact, the contour lines on said chart were of land that existed in 1882 and had largely disappeared in 1894."

Since the testimony of Captain West and of Captain Marshall is so directly antagonistic, and since the testimony of each of them is so important for the determination of the deciding factor in this case, that is, whether or not Tullos Island completely washed away, it becomes of the utmost importance that it be determined which of the witnesses is correct with reference to their statements concerning the Mississippi River Commission Survey of 1894. If Captain West's testimony that there was not a detailed topographical survey of 1894 be correct, then his testimony to the effect that the change in the channel was the result of erosion on the Mississippi shore and accretion to the Louisiana shore is of value because there would be nothing shown thereon in so far as the elevations, depressions and contours of the land are concerned to contradict it. On the other hand, if Captain Marshall's testimony that there was a detailed topographical survey in 1894 be correct, then the testimony of Captain West is entirely worthless because of the fact that he has utterly disregarded those things which are most important in giving weight and worth to the testimony of an expert witness whose testimony is based entirely upon maps.

To show that Captain West was in error and that coun-

sel for complainant have blindly followed him in it, it here considered only necessary to refer the court to an e amination of complainant's Exhibits 4-A-B-C, which a blue prints of the original field survey or work sheets the Mississippi River Commission Survey of 1894, certifi to by the Secretary of War as being true and correct.

Captain West's testimony shows that field notes a work sheets of the 1894 Survey were on file in the office the secretary of the Mississippi River Commission in S Louis, R. p. 157 and 158, and Captain Marshall's testimo shows that Exhibits 4-A-B-C to his testimony are blue prin of the original fi'l sheets of the 1894 Survey. R. p. 17 The field sheets themselves, as indicated by sheet numb 5½, show the following character of detail:

"Mississippi River Commission,

Office of Secretary.

Low water survey of Mississippi River.

Arkansas River to Vicksburg.

Shore lines, bars and hydrography as shown by s vey made from October 20 to December 15, 1894.

W. G. Comber, Chief of party.

E. L. Armand, O. N. Axtell, Topographers, Book N 2903, Book No. 2906-2909.

T. C. Hockridge, E. D. Jones, Hydrographers, Bo No. 2889.

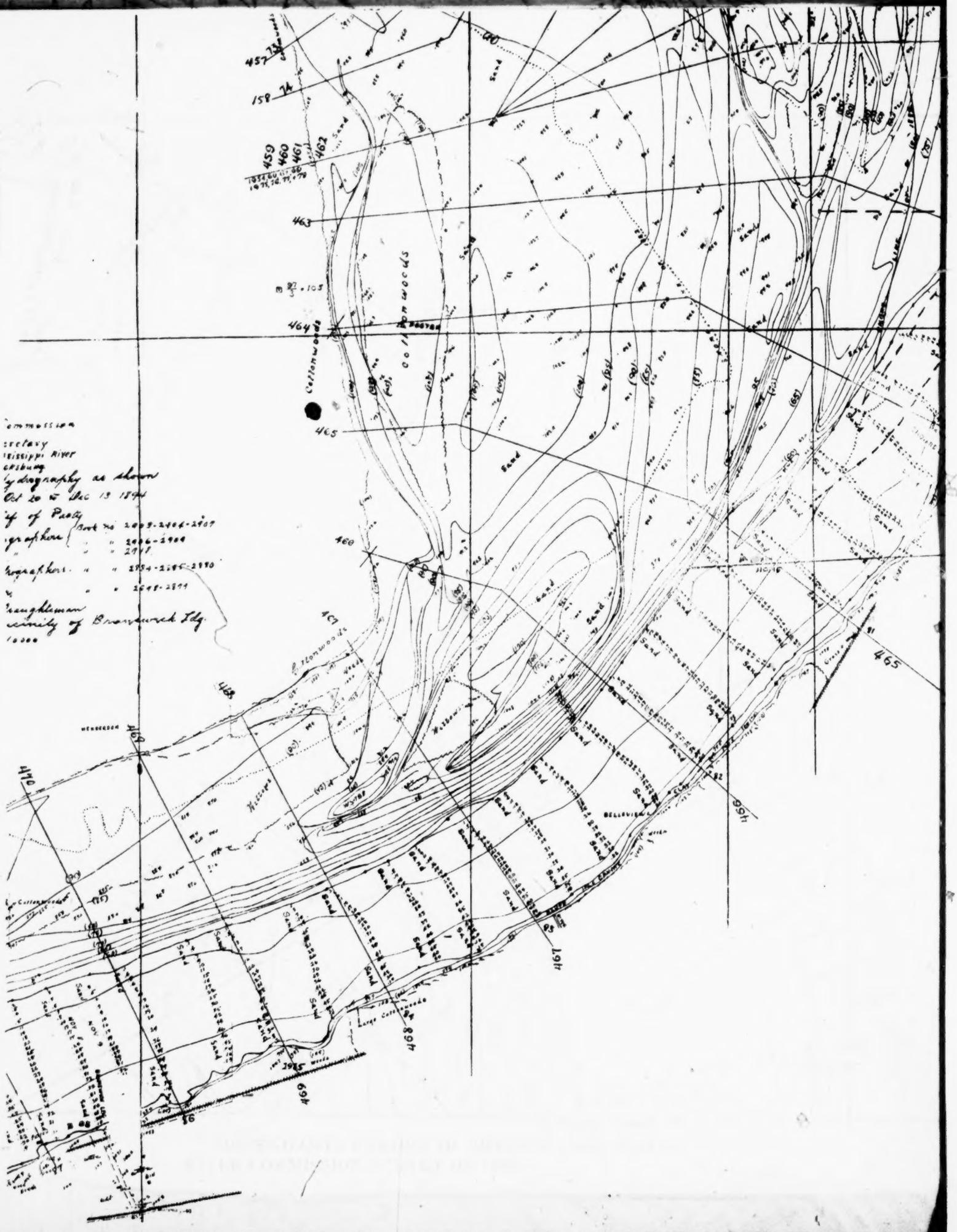
C. A. Bonfils, Leveler. (Book No. 2899.)

Gustav Bischoff, Draftsman.

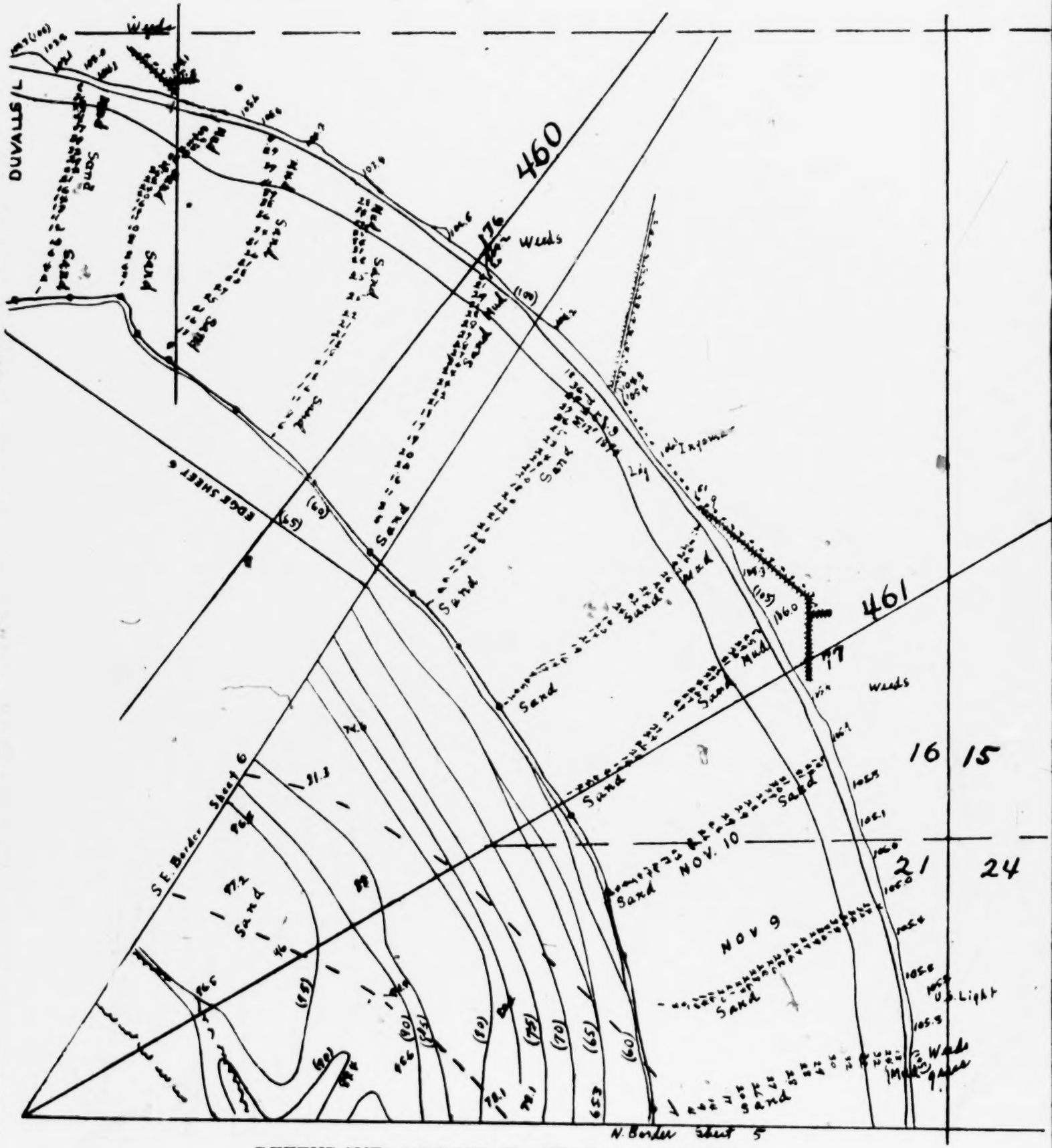
Field Sheet No. 5½—Vicinity of Duvall's, L. D. Landing.

Scale, 1:10,000."

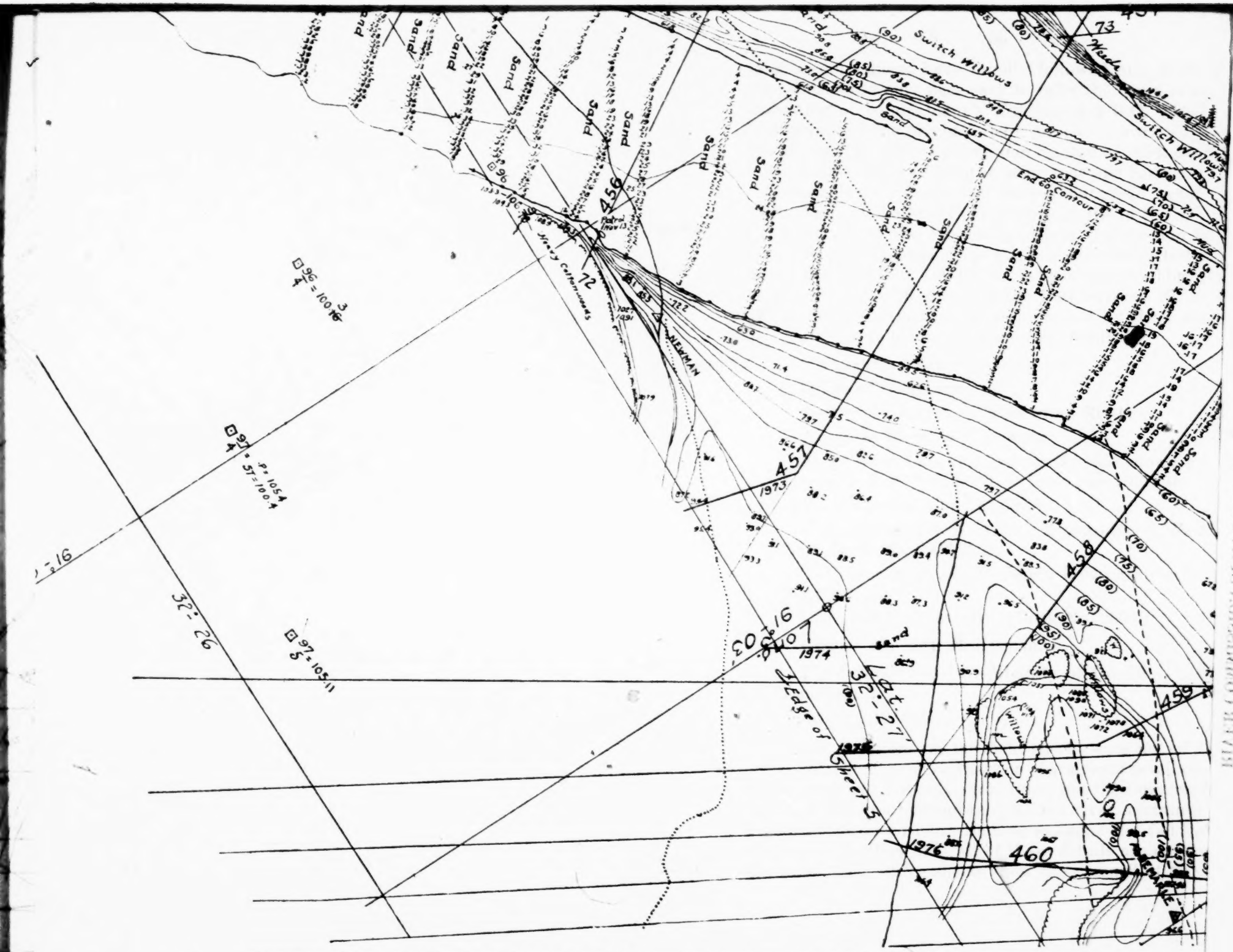
If these notations on the field sheets were not of " selves sufficient to show that the character of detail c by the map was not only shore lines, but the topograp the land and the hydrography of the river, certainly necessary to do no more than to examine the field s themselves to show that all of these details are cove the work. The three sheets show the channel of th



DEFENDANTS EXHIBIT 4A, SHEET NO. 5, MISSISSIPPI RIVER SURVEY OF 1894.



DEFENDANTS EXHIBIT 4B, SHEET 5½ MISSISSIPPI RIVER COMMISSION SURVEY OF 1894.



DEFENDANTS EXHIBIT 4C, SHEET NO. 6, MISSIS SIPPI RIVER COMMISSION SURVEY OF 1894.

around to the east and north of the location of upper and lower Tullos Island in 1894. Soundings in the river are shown, to the south and west of the river is shown the land, and its topography is indicated by contour lines, elevations and notations as to the character of the soil, such as mud and sand, and the character of timber or growth shown thereon, such as grass, weeds, willows and cottonwoods. With these exhibits in evidence it certainly would be treating the survey of the Commission with scant regard to say that these field sheets do not show a detailed topographical history of the territory in question.

Counsel for complainant, however, attempt to explain this away by saying that the detailed data shown on these field sheets was merely copied or taken from the data shown on the Mississippi River Commision Chart No. 45 of the 1882 Survey. This statement, however, is deserving of little more consideration than that which denied the existence of the details themselves. It is necessary only that a comparison of the data shown on the 1882 map with that shown on the 1894 field sheets be made to show the error in this regard. The most obvious and glaring inconsistency in this statement is shown by the fact that the 1894 Survey with the river to the north and east of the location of Tullos Island in 1882, shows the soundings in the river. Counsel will probably have a difficult time in explaining how the soundings in the channel of the river as it existed in 1894 were taken from the chart of the 1882 survey. Another glaring inconsistency in this statement is shown by the fact that the channel of the river in 1882, shown on Chart 45 in detail by soundings is shown on the 1894 map as being land, marked by elevations and contours and shown thereon as being 20 feet above the level of the river. There are numerous other differences, to which the attention of the court could be called, to show the utter disregard which counsel have given to these maps, such as the difference in the elevations of the various points as shown on the 1882 and 1894 Surveys, but these will not be touched on here because they are deemed unnecessary.

We think that it is proven beyond question that the 1894

Survey shows the same character of detail and gives the same data that the 1882 Survey gives, and that both Captain West, witness for, and counsel for the complainant, who blindly followed his testimony, are mistaken when they say that there was no Survey in 1894 of the same character as the Survey of 1882. If this be true, then it is evident that the testimony of Captain West is entitled to little or no weight because he utterly disregarded the essential factors which should have controlled his opinion.

Having now discussed the testimony offered by complainant to show that Tullos Island entirely disappeared, defendant will attempt to show that this Island did not disappear.

Complainant's witnesses, E. T. Purnell, and Joseph V. De La Hunt, show that upper Tullos Island did not wash away. R. pp. 275, 277 and 298.

Defendant's witnesses, William Miller, R. p. 304, Lawrence Townes, R. p. 220 and 231, and R. E. Foster, R. p. 209, show that neither upper nor lower Tullos Island completely washed away.

The testimony is undisputed that in the year 1893 both islands were in existence and that there were trees growing on them. (Testimony of Purnell, R. p.p. 264, 282, De La Hunt R. p. 292, Miller R. p. 304, Townes R. pp. 221 and 222, Foster R. pp. 209 and 210, Marshall R. p. 175).

The testimony of the complainant's witness, E. T. Purnell, shows that the channel of the river changed around Hopkins Island (upper Tullos Island as shown by his testimony, R. p. 277), and the testimony of the complainant's witness, De La Hunt, shows that the channel of the river had come to the north and east of this island; and that the channel was in that location, and the island (upper Tullos Island) was there in 1908. R. pp. 292 and 298. All of the witnesses who were familiar with the physical facts existing on the territory in dispute after the year 1894 are agreed that there was a depression between Willow Point and what was variously designated by them as Island 98, or Newman's Towhead, and the testimony of Captain Marshall that this depression was in the same location as the river channel in 1882 is undisputed.

The testimony of defendant's witness, Albrittain, shows that in 1924 he went upon the Towhead (islands) with a surveyor and found high ground in the same location as that of the islands in 1882. The soil on this high ground was of the same character as the soil on the mainland and large cottonwood trees, the largest on the towhead, grew there. This high ground extended to the river on the west, and was bounded on the east by a steep bank, shown to be in the location of the west bank of the 1823 island chute. To the east of this high ground was made land with soil of a different kind and covered with a different growth-willows. R. pp. 243, 244, 252.

Complainant's witness, W. H. Reed, corroborates this testimony, showing that he was falimiar with the high bank, the varying character of soil deposits, and growth thereon at this particular point. R. pp. 124, 125.

N. B.: This testimony shows that the island could not have washed away. On the contrary, it is evidence of the fact that the channel of the river had gone around this high ground (islands) making a new channel to the east and from there gradually moved eastward by erosion of the main Mississippi shore, the islands being gradually added to and enlarged by accretion.

The testimony of Captain Marshall, giving his interpretation of the history of the change in the river from 1882 to 1894 based on the 1894 field and work sheets and the map of the Mississippi River Levee District, showing changes in the channel of the river from 1882 to 1896, should be considered with special reference to the above testimony because of the fact that his interpretation of the maps is borne out practically in every detail by the testimony of these witnesses. It should also be borne in mind, in examining the testimony of this witness that his opinions are not unsupported by facts, but each statement by him is based on data obtained from the charts to which he referred, or is based on personal knowledge of the situation. As has been stated before, a most important thing to be kept in mind in considering the testimony of this witness is, that there is no dispute of the fact that both upper and

lower Tullos Island were in existence as late as 1893.

Captain Marshall, using as a basis for his testimony Exhibits 4-A-B and C, first shows that at the time the Survey was made in 1894 there was high ground in the same location as Tullos Island in 1882 and of a slightly higher elevation than were the Islands at that time (1882). To the west of the location of this high ground there is shown low ground, this low ground being 20 feet lower than the high ground, and some 25 feet above the water level. R. p. 172-173. The witness next shows by superimposing over the 1882 Survey a tracing of the 1894 Survey that the high ground referred to was in the identical location as the Islands in 1882, and that the low ground was in the identical location of the river in 1882. R. p. 178. He next shows that there was timber, cottonwoods and willows, growing on this high ground. R. p. 173-174. The witness next, by comparison of Chart 45 of the 1882 Survey and Chart 47 of the 1913 Survey, shows that the river in 1913 had returned to the same location as occupied by it in 1882.

It will, therefore, be seen, that this witness has shown the following facts:

1. That in 1894 there was high ground practically of the same elevation and in the same location as the Islands in 1882.

2. That the channel of the river was to the east of this high ground, and over the location of the old 1823 Island chute.

3. That to the west of this high ground there was low ground in the identical location as the channel of the river in 1882.

4. That there were cottonwood and willow trees growing on this high ground at the time of the Survey in 1894.

5. That the channel of the river in 1913 was in the same location as in 1882.

These facts are not and cannot be disputed because they are shown positively by the official maps and charts introduced as exhibits in the case. With these facts as a basis

the witness then gives it as his expert opinion that the channel of the river changed so as to cut around to the north and east of upper and lower Tullos Island and made a new channel there by widening and straddling the old 1823 Island chute. With these facts established it would not take an expert to reach the conclusion given by Captain Marshall, the facts themselves being so plain and convincing that the humblest citizen could reach no conclusion other than that given by the witness. It will be recalled that the testimony is undisputed that the Islands were in existence in 1893, and yet one year later by the Survey of 1894—it is shown that there were then cottonwood and willow trees growing on the high ground. (The Islands.) It is inconceivable that if the island had completely washed away, as contended by complainant, the towhead could have built back in that one year and have had growing upon it cottonwood and willow timber. The analysis of the undisputed facts reduces the contention of complainant to an absurdity.

Captain Marshall further substantiates his testimony in this regard by explaining the facts shown by the Mississippi River Levee District map of Albemarle Bend which was prepared by Captain C. H. West in 1908, but introduced as an exhibit to the defendant's testimony. The progressive building of the levees as disclosed by this map shows how the caving by the river, which was confined to the lower part of lower Tullos Island in 1882 had, by 1888, shifted above and behind or to the north and east of Tullos Island, and from there gradually widened out the chute to the east of Tullos Island. R. pp. 180-181.

The inescapable and incontrovertible fact is that the engineers of the Mississippi River Commission in 1894 found the islands in their old position with timber growing thereon and delineated them on their work or field sheets, and on the same survey and work or field sheets showed the river had passed around them to the north and east.

The fact is also inescapable that all of the maps or charts introduced in evidence save only the blue prints made by Captain West and offered as Exhibits to his testimony show

the islands. As was well explained by Captain Marshall:

> "Q. Does any other drawing or map which you have seen, except this map, or No. 3 of C. H. West, lose sight of the island?
>
> A. No, I have not seen any of the maps except the Mississippi River Commission maps which have been under discussion, the 1 to 10,000, 4-A-B- and C, the one inch to the mile, 17, Exhibit 3, those are the only maps that I know of, except the one issued with the superimposed lines on Sheet 17 showing the 1894 line, from which, I presume, Captain West prepared his Exhibit I. None of those shown was accretion, and none of them have the island left off."

In this connection the fact must not be lost sight of that during this entire period of time the territory comprising the islands was assessed for taxation by Issaquena County in accordance with the laws of the State of Mississippi (as will be more fully discussed under the next subdivision of this brief) by the owners thereof giving in the same under oath to the assessor with the value thereof fixed by them; that the acreage, valuation, and ownership of these lands varied during the years; that taxes thereon were paid to the State of Mississippi, or in default thereof the lands were sold by the State. These facts show not only that the State of Mississippi exercised acts of sovereignty, dominion and control over the territory but also that it was actually in existence during this period of time.

It is, therefore, respectfully insisted that the testimony of the witnesses and the proof furnished by the maps and other exhibits in this cause show conclusively that Tullos Island did not wash away, but that the channel of the river changed about it, so as to cut around to its north and east side, leaving the old river bed to fill up and connect the island with the Louisiana shore.

III.

EVIDENTIARY VALUE OF EXHIBITS A TO N.

Before closing this brief it will not be amiss to give some consideration to the question of the evidentiary value of the

defendant's exhibits A-N. These exhibits have been discussed in the preceding pages of this brief for the purpose of showing that from the time of the earliest surveys and especially during the years 1882-1894, the State of Mississippi has claimed these lands and has exercised dominion and sovereignty over them; while the State of Louisiana did not in any way assert or exercise control or sovereignty over them, but impliedly conceded such sovereignty to Mississippi.

Counsel for complainant do not undertake nor attempt to show that the State of Mississippi was not, during this period of time, exercising acts of dominion and sovereignty over this territory, by assessing it for taxation, selling it for the non-payment of taxes, etc., but are constrained to treat these facts lightly and as being of little value. In speaking of these assessments counsel in their brief at page 98 say:

> "The assessors in making these assessments do not survey the land, but merely go to the deed records and year after year assess the same property over again many times, long after the property has washed away. Such assesments prove only rem ipsam, that is, that they made such assessment."

This statement by counsel in their brief is unwarranted, and is unsupported, either by law or by the facts in the case.

Sections 489, 490, 491, 492 and 495, Mississippi Code of 1880, provided the method for the assessment of lands in the State of Mississippi during this period of time. These sections provided that: "Lands shall be assessed once in every four years according to the intrinsic value to be judged of by the owner or person having possession or charge thereof on oath, etc."

Sections 490, 491, 492 and 495 provide how the land rolls are made up and how the lands are described thereon and assessed. These sections show that the duty is strictly imposed upon the assessor to see that all the land in his county appears on the assessment roll, and that such lands are properly assessed for taxation.

Section 505 imposes the duty on the board of supervisors of examining the assessment roll for the purpose of ascertaining that it embraces all of the land in the county and correctly represents its ownership.

Section 507 provides that:

> "In case of the destruction or deterioration in value of any real estate by any casualty, etc. * * * the board of supervisors shall have power * * * to change the assessment so as to reduce or increase it to the true value of the property, etc."

N. B. For full text of these Code sections see appendix.

So it is seen that instead of the assessment being made in the haphazard manner suggested by counsel in their brief, the roll is very carefully made up by the owner of the property giving in the same, under oath, to the assessor. The duty is also imposed on the board of supervisors to carefully examine the roll to see that the same embraces all the property in the county subject to taxation, and the power is given to them, in case it is shown that any property on the rolls has been destroyed, to strike the same therefrom, or to reduce its value in accordance with the true facts.

There being no proof that the provisions of the law in this regard were not followed, it must be presumed that the officers of Issaquena County in the performance of their official duties performed them in the manner required by the law.

With reference to the map of East Carroll Parish, introduced by the defendant, counsel say the following in their brief at page 99:

> "The map of East Carroll Parish, introduced by defendant, prepared by a Mr. Montgomery, not made from any survey at the time of its execution, but evidently made from the land survey of the United States Government of 1824, cannot show what accretions or erosions occurred since then, and is without any value as evidence when it is in direct contradiction of the charts of the Mississippi River Commission, made from

actual surveys, at the time, and oral testimony of eye-witnesses."

It is evident from this statement that counsel have entirely misconceived the object and the purpose for which defendant introduced this map. The purpose of introducing it was not to show that the surveys of the Mississippi River Commission in 1882 and 1894 were incorrect, but only for the purpose of showing what territory East Carroll Parish, Louisiana, claimed as its own and over which it was exercising acts of sovereignty, dominion and control.

This map as certified and authenticated pursuant to the agreement entered into by counsel, as disclosed by the record at page 319, shows it to have been made by direction of the board of police of East Carroll Parish. The record, therefore, shows that not only did East Carroll Parish fail to exercise acts of sovereignty, dominion or control over the territory here in dispute, by failing to assess the same for taxation, but by the adoption of this map as the official map of the parish, has recognized that it has no right to such lands.

The defendant takes the position that these facts should have great weight with the Court in determining the merits of this controversy.

The rule is well settled that where the question is one of boundary between two states of the Union, long acquiescence in the location of a particular boundary and the exercise of dominion and sovereignty over the territory within it is conclusive as between the states.

Rhode Island vs. Massachusetts, 4 Howard 591, 11 L. Ed. 1116,

Missouri vs. Kentucky, 11 Wallace, 395, 20 L. Ed. 1116,

Indiana vs. Kentucky, 136 U. S. 479, 34 L. Ed. 329, 10 Sup. Ct. Rep., 1051,

Virginia vs. Tennessee, 148 U. S. 503, 37 L. Ed. 537, 13 Sup. Ct. Rep. 728,

Maryland vs. West Virginia, 217 U. S. 1, 54 L. Ed., 645,

Arkansas vs. Tennessee, 246 U. S. 158, 62 L. Ed., 638,
Michigan vs. Wisconsin, 270 U. S. 295, 70 L. Ed. 595,
Oklahoma vs. Texas, 260 U. S. 606, 67 L. Ed. 428,
Oklahoma vs. Texas, 272 U. S. 19, 71 L. Ed. 145,
Franzeni vs. Layland, 120 Wisconsin 72, 97 N. W. 499.

In the case of Indiana vs. Kentucky, supra, the court said:

> "This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and right."

In the case of Virginia vs. Tennessee, supra, the court said:

> "As said by this court in the recent case of Indiana vs. Kentucky, 136 U. S. 479, 516 (34: 329, 335) it is a principle of public law, universally recognized, that long acquiescence in the possession of territory, and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority. In the case of Rhode Island vs. Massachusetts, 45 U. S. 4 How. 591, 639 (11:1116, 1139) this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the actions of the commissioners of the colonies, said: 'Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by

time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary.' "

In the case of Louisiana vs. Mississippi, 202 U. S. 1, 50 L. Ed. p. 932 and 934, the court said:

"The record contains much evidence of the exercise by Louisiana of jurisdiction over the territory in dispute, and of the general recognition of it by Mississippi as belonging to Louisiana. Apparently Louisiana had exercised complete dominion over it from 1812 with the acquiescence of Mississippi, unless the fact that the latter made a general reference to islands within 6 leagues of her shore in her Code of 1880 indicated otherwise. But the evidence fails to satisfy us that she attempted any physical possession or control until after 1900. The few instances referred to as showing that Mississippi asserted rights in the disputed area are of little weight and require no discussion."

In the case of Maryland vs. West Virginia, supra, the court said:

"It is true that there has been more or less contention as to the true boundary line between these states. Attempts have been made to settle and adjust the same, some of which we have referred to, and the details of which may be found in the very interesting document to which we have already made reference, the report of the committee of the Maryland Historical Society."

* * * * *

"Independently or any effect due to the compact as such, a boundary line between states or provinces, as between private persons, which has been run out, located, and marked upon the earth, and afterwards recog-

nized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary."

In the case of Franzeni vs. Layland, 120 Wisconsin, 72, the court said:

> "The undisputed evidence that for over fifty years, for all governmental and other purposes, the territory between Coon Slough and the Mississippi River proper has been considered by this state, the general government, and the State of Minnesota as well, as east of the boundary line between the two states, would be conclusive evidence, at least in a suit between private parties, of its proper location. Acquiescence for a long period of time is evidentiary of the right involved between sovereignties as well as between individuals."

In the case of Oklahoma vs. Texas, 260 U. S. 606, 67 L. Ed. 428, the court said:

> "Texas has been exercising jurisdiction over the area and asserting proprietorship of the soil for more than half a century, and has surveyed and disposed of it all, the earliest disposals being in 1856. Some of the later surveys seem to conflict with those first made, but all name the river bank as a boundary. In those of 1856, and possibly others, it was the controlling call. See Schnackenberg vs. State-Tex. Civ. App.- 229 W. 934; Cordell Petroleum Co. vs. Michna, 276 Fed. 483. The jurisdiction and title of Texas stood unchallenged until shortly before this suit. Our conclusion is that the claim that the river, or any part of it, ran south of this area in 1821, is not sustained. So the boundary follows the cut bank around the northerly limit of the area."

The defendant does not in this case take the position that these acts of dominion and sovereignty, exercised over the territory in question, by assessing the same for taxation, selling it for non-payment of taxes, and dealing with

it as its own, is alone sufficient to establish its title to the lands in controversy, even though such acts of sovereignty are coupled with acquiescence therein by the State of Louisiana. The State of Mississippi, however, does take the position that these acts of dominion and sovereignty should be given great weight and are strong evidence of the rights of the parties with reference thereto.

IV.

CONCLUSION

The State of Mississippi, therefore, respectfully contends that the State of Louisiana has failed, first, to prove that the change of the Mississippi River from its 1823 to its 1882 channel was the result of accretion. If this be true, then the case of the State of Louisiana must fail, not only as to the territory now embraced in what is known as Newman's Tow Head, but also as to that territory now on the Louisiana mainland and lying between the present channel of the river and the thread of the stream of the river in 1823.

But if the court takes the position that the State of Louisiana has shown this change to be by accretion, the defendant State of Mississippi still contends that the complainant has not shown the change in the river from its 1882 to its 1894 channel to be a result of erosion of and washing away of Tullos Island and the extension of the Louisiana shore line by accretion; but that the proof establishes the fact that such change was occasioned by the river eating into the Mississippi mainland, north and east of Tullos Islands and thereby passing around them, and upon filling of the old channel leaving the former island intact but connected to the Louisiana shore. If the State of Louisiana has failed to establish this fact, then what is now shown on the maps and designated as Newman's Tow Head should be adjudged by decree of this court to be Mississippi territory and the boundary between the States of Louisiana and

Mississippi at the point in question fixed as the middle of the channel of the Mississippi River as it flowed in the year 1882.

Respectfully submitted,

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APPENDIX

MISSISSIPPI CODE OF 1880

Assessment of Lands

Sec. 489: Lands shall be assessed once in every four years, according to intrinsic value, to be judged of by the owner or person having possession or charge thereof, on oath, taking into consideration the improvement, also the proximity to navigation, or to any town, city, village, or road, and any other circumstance that may tend to enhance the value, and not at what it might bring at a forced sale, but what the owner would be willing to accept and expect to get for it, if he was disposed to sell it; and if any person shall deliver or disclose to any assessor or deputy assessor, any list, statement or return, in regard to his land, which, in the opinion of the assessor or deputy assessor, is false or fraudulent, or contains any understatement or under-valuation, it shall be lawful for the assessor or deputy assessor to make an assessment of said land, at a valuation equal to the highest rate per acre, for any lands adjoining said land so under-valued, which may have been returned under oath. Land not given in by any person, shall be valued in the same manner by the assessor; and should there be a difference in the value of different parcels of a tract, the several parcels of such different values shall be separately assessed; *provided,* that the first assessment, under this law, shall be made in the year 1883, and until that shall have been made, the assessment in the year 1879, shall continue in force, and be the basis of taxation and collection.

How Land Roll Made Up

Sec. 490: Each assessor shall keep the land assessment roll separately, and he shall commence the same in the lowest number of range and township in his county, and in the northeast corner of each township, and shall proceed, numerically, with all the sections, townships, and ranges in his county, first setting down all the subdivisions of each section, as they belong to different individuals, or the whole section together, if owned by one person and not divided on account of parcels being of different value; and if more than one person shall claim to be the owner of the same

tract or parcel of land, the assessor shall so state in his assessment roll, and shall only be entitled to the value of one assessment, and the tax collector shall only collect the taxes on one assessment; land of the United States, or land exempt from taxation, shall be set down in separate columns, without the value. Lands not surveyed according to the plan of the government surveys, shall be set down by the designation used on the government maps, or by other means, by which they may be distinguished; and if parts of such lands shall be owned by different persons, such part shall be referred to by quantity, and such short memorandum as may be convenient to show the locality. In assessing land situated in any city or town, the assessor shall proceed according to the plat or plan thereof, commencing with the lowest number of square and lot, or other subdivision, and proceeding numerically, with all the lots in a square, and all the squares in the city or town, until completed; but no failure to observe any of the requirements, shall be held to vitiate any assessment, if the land be so described as to be identified; and it shall be a sufficient identification of land to describe it as "the land of ..... (the person owning or claiming it), occupied by.....," or "that part of (section or other known division, designating it) owned or claimed by.....;" or "the lot on which resides" or "the lot occupied by..... .....;" or "by the name of which it may be known, or by any description, which will furnish a sure guide for the ascertainment by parcel evidence of the particular land intended.

Description of Land

Sec. 491: In assessing land, a description of it as a part of a designated tract or division, shall be held to embrace such part as is the subject of separate ownership as one tract or division whether owned by one or several jointly; and when part of a designated tract or division shall be sold for taxes; the sale shall pass the title of such part as was the subject of such separate ownership when it was assessed; and the sale of a specified number of acres of a tract containing more or a specified portion of a tract shall

pass an undivided interest in the whole tract equal to the proportion which the number of acres or portion sold, bears to the whole tract; and when part of a known tract or division of land is assessed by a description which identifies it, any other part of it which is assessed, but not so identified, shall be held to embrace all of such tract or division not included in the part identified; and parol testimony shall always be admissible to apply a description of land on the assessment roll, or in a conveyance for taxes, where such testimony will show what land was assessed and sold, and there is enough in the description on the roll or conveyance to be applied to a particular tract of land by the aid of such testimony.

What Carried Forward to Last Page

Sec. 495: To facilitate the assessment and collection of taxes, the board of supervisors of each county shall procure, if not already done, and keep a land book, or book of maps of all the townships and fractional townships in the county, which book shall be well bound, and shall be deposited in the office of the clerk of the board of supervisors; and shall procure lists of lands in their counties owned by the United States, and no allowance shall be made to the assessor, who does not show upon his assessment roll an assessment of every acre of land in his county, as shown by the map or townhips in his county, if there be such; and it shall be the duty of the board of supervisors to carefully compare the assessment roll with the said maps, with a view to the enforcement of this provision.

Roll to Embrace and Correctly Describe All Lands.

Sec. 505: It shall be the duty of the board of supervisors to carefully examine the assessment roll of lands before approving it, to see that it embraces all of the land in the county, and correctly represents it as being the property of individuals, or the State, or United States, and taxable or not taxable, according to law, and that all land correctly described according to law, so as to be identified with certainty; and all land improperly omitted from such roll shall be added thereto by such board or under its direction, and land incorrectly or insufficiently described shall be caused

by such board to be properly described on said roll before it shall be approved; and the assessor shall at once make all corrections in the said assessment roll, which said board may direct, but the board may cause such corrections to be made by the clerk of such board.

Change in Assessment in Certain Cases

Sec. 507: In case of the destruction or deterioration in value of any real estate, by any casualty, or in case of clerical error in the assessment rolls, or in case of over-assessment, known to be such, or in case of a change of ownership, after assessment, or in case of an increase of value by the erection of improvements, the board of supervisors shall have power, at any time, on the application of a party interested, or otherwise, to change the assessment so as to reduce or increase it to the true value of the property, or to cause the taxes to be charged to the purchaser thereof; and in case of the reduction or increase of any assessment, the same shall be certified by the clerk of the board of supervisors to the auditor.